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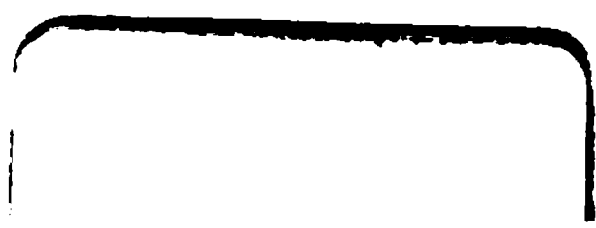
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CASES

ARGUED AND DETERMINED

IN

The Court of Common Pleas.

VOL. II.

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ARGUED AND DETERMINED

IN

The Court of Common Pleas,

WITH TABLES OF THE NAMES OF THE CASES ARGUED
AND CITED,
AND OF THE PRINCIPAL MATTERS.



By JAMES MANNING,

SERJEANT AT LAW,

AND

T. C. GRANGER,

OF THE INNER TEMPLE, ESQUIRE, BARRISTER AT LAW.

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J U D G E S

OF

THE COURT OF COMMON PLEAS,

DURING THE PERIOD CONTAINED IN THIS VOLUME.

The Right Hon. Sir NICOLAS CONYNNGHAM
TINDAL, Knt. Ld. Ch. J.

The Right Hon. Sir JOHN BERNARD BOSANQUET, Knt.

The Right Hon. Sir THOMAS ERSKINE, Knt.

Hon. Sir THOMAS COLTMAN, Knt.

Hon. Sir WILLIAM HENRY MAULE, Knt.

ATTORNEY GENERAL,

Sir JOHN CAMPBELL, Knt.

SOLICITOR GENERAL,

Sir THOMAS WILDE, Knt.

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ERRATA ET ADDENDA.

- Page 9. note (a), for "*Parkhurst v. Smith* and others," read "*Parkhurst* and others."
28. line 5. for "that was," read "that it was."
55. in marginal note, line 3. from bottom, for "after matters," read "all matters."
58. line 11. from bottom, for "*W. F.*," read "*W. Fisher.*"
68. line 11. from bottom, for "*Marten v. Burge*," read "*Marten or Mortin v. Burge*, 4 *A. & E.* 973., 6 *N. & M.* 201."
129. lines 6. and 7. from bottom, for "term "inherit" and fall by descent," read "terms "inherit" and "fall by descent."
134. third paragraph line 1. for "After," read "That after."
138. line 13. after "*Clarence* aforesaid," read "to the port of *London* aforesaid."
147. lines 7. and 8. for "another, and in the 6 *G. 4. c. 107. s. 122.* as importation," read "another; and in the 6 *G. 4. c. 107. s. 122.* of importation."
148. note, line 3. dele "*s. 70.*"
149. line 8. from bottom, for "intended plane," read "inclined plane."
156. line 9. transfer "(b)" to the end of line 8. from bottom.
—— to note (b), add "60."
159. line 2. for "part," read "port."
162. line 17. after "sixty-second," add "section of the 1 & 2 *G. 4. c. xliv.*"
177. line 6. from bottom, for "townships of *Cridling Stubbs*;" read "townships; the townships of *Cridling Stubbs.*"
201. line 7. for "as," read "or."
—— line 2. from bottom, dele "therefore."
209. line 6. from bottom, for "party. Yet," read "party; yet."
212. lines 3. and 4. for "mentioned," read "last-mentioned."
line 5. from bottom, for "had," read "and had."
214. line 14. from bottom, for "the plaintiff *Price*," read "*Price*, one of the plaintiffs."
225. note (a), line 10. after "saved," insert inverted commas.
—— line 3. from bottom of col. 2., dele inverted commas.
227. line 8. from bottom, insert] after "other."
229. line 8. for "be," read "must be."
248. note (b), add "*S. C. per nom. Sainsbury v. Matthews*, 4 *M. & W.* 343."
—— note (c), add "*5 M. & W.* 427."
—— note (g), after "616.," add "*1 Cro. & M.* 112."
264. line 8. for "*Sharforth*," read "*Shadforth.*"
—— line 16. for "*Cooke*," read "*Tooke.*"
324. note, col. 2. line 4. for "plaintiff," read "defendant."
336. to marginal note add, "But this case has been overruled. See post, 965."
448. note (b), line 16. for "*Wandsworth v. Handcude*," read "*Wadsworth v. Handside*," and line 20. dele "(c. 3.)"
452. note (b), add "And see post, 995. n."
460. note, line 19. for "*3 & W. 4.*," read "*3 & 4 W. 4.*"
463. note (a), line 2. for "*3 G. 4. c. 29.*" read "*3 W. 4. c. 39.*"
464. note (b), line 10. for "*19 H. 7. fo. 9.*" read "*19 H. 7. c. 9.*"
519. note (c), for "*c. 185.*" read "*c. 184.*"
564. line 7. from bottom, after "court," insert "is."
655. note, line 4. for "vendor," read "vendee."
—— note, col. 2. line 3. for "lib. 2.," read "lib. 3."
657. note (b), last line, add "anté, 655. n. *Pothier, Traité du Contrat de Vente*, partie 2. chap. 1. sect. 1. art. 3. "*De l'obligation de conserver la chose jusqu'à sa livraison.*"
744. note, line 14. for "*6 H. 71. fo. 10. pl. 18.*," read "*6 H. 7. fo. 10. pl. 8.*"

CASES

ARGUED AND DETERMINED

1840.

IN THE

COURT OF COMMON PLEAS,

IN

Michaelmas Vacation,

IN THE

FOURTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in Banc during this Vacation were,

TINDAL C. J.

COLTMAN J.

BOSANQUET J.

MAULE J.

THOMAS ASHTON v. HUMPHREY MAY
FREESTUN.

Dec. 3.

ASSUMPSIT, upon a bill of exchange for 11*l.* 18*s.* drawn 7th of *May* 1839, payable three months after date, brought by the drawer and payee against the acceptor; and upon an account stated. In an action by the payee against the acceptor of a bill of exchange, the defendant pleaded, that before the bill became due, and whilst the plaintiff was the holder thereof, and before the commencement of the action, the plaintiff released the bill; without alleging that the release was *after* the acceptance. Held, on demurrer, that the plea was bad for not averring that the release was *after* the acceptance.

An instrument set out upon oyer must be read as forming part of the declaration (or other pleading) in which profert has been made of such instrument.

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holder thereof, and before the commencement of the suit, the plaintiff, by a deed poll, sealed with his seal, and bearing date the 1st day of *July* 1839, *prolat. in curiam*, remised, released, and for ever quitted claim (a) unto the defendant, the bill in the said first count mentioned, and all manner of actions, cause and causes of actions and suits, controversies, damages, claims, and demands whatsoever, which the plaintiff then had, or at any time or times thereafter could, should, or might have or be entitled to, from, upon, or against the defendant, his heirs, executors, or administrators by reason, or on account of the said bill, or the non-payment thereof. Verification.

The replication set out the deed-poll upon *oyer*: “ To all to whom these presents shall come, we, whose names and seals are hereunto subscribed and affixed, being creditors respectively who have proved our respective debts under a *fiat* in bankruptcy which issued against *H. M. Freestun*, of &c., bearing date the 11th day of *September* 1832, severally send greeting. Whereas a proposition having been made by a friend of the said *H. M. Freestun* to pay to us respectively a composition of 2s. 6d. in the pound upon our respective debts, which we have consented and agreed to accept in full discharge thereof, and to release the said *H. M. Freestun* of and from payment of our respective debts in manner hereinafter mentioned; now know ye, that we the said several creditors of the said *H. M. Freestun*, in pursuance of the said recited agreement, and in consideration of the said dividend of 2s. 6d. in the pound upon the amount of our said several and respective debts, being paid, by the aid of a friend of the said *H. M. Freestun*, unto us respectively, for and on behalf of ourselves and our several respective partners, do and each and every of us

(a) More correctly, “ quit-claimed,” *quietum clamavit*.

doth, by these presents, absolutely remise, release, and for ever quit-claim unto the said *H. M. Freestun*, his heirs, executors, and administrators, all and all manner of action and actions, suit and suits, cause and causes of action and suit, controversies, damages, claims, and demands whatsoever which we the said several creditors of the said *H. M. Freestun*, or any of us alone or jointly with our respective partners, now have, or which any of us or our or their respective heirs, executors, or administrators at any time or times hereafter, can, shall, or may have or be entitled to from, upon, or against the said *H. M. Freestun*, his heirs, executors, or administrators by reason or on account of any *debts*, sums of money, bills, notes, securities for money, contracts, promises, agreements, reckonings, accounts, dealings, or transactions whatsoever, owing from, or made or given or entered into by, the said *H. M. Freestun* to or with us respectively, either alone or jointly with our respective partners, or transacted, done, or depending by and between him and us respectively, or any of us, from the beginning of the world to the day of the date of these presents. (a) (Here followed the signatures of the releasing creditors, amongst which was that of the plaintiff.) The plaintiff then joined issue upon the

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(a) The plaintiff may have been under the necessity of craving oyer of the deed, for the purpose of obtaining a copy of it. The expediency of setting out the deed *in hæc verba* does not appear to be equally clear. The recital in the release shews that the debt which had formed the subject of the release, had been proved under the fiat, and must therefore be taken to have been contracted before the release. Then the plea alleges that the release applied to the bill. And though, where a deed

is set out upon oyer in the replication, the *ipsissima verba* of the deed control the operation of the plea in which the deed is pleaded, (supposing the allegations of the plea are at variance with the language of the deed on which it purports to be founded,) the collateral operation of the plea as to matters *dehors* the deed, *e.g.*, the statement of the demand, or class of demands, which the deed was intended to discharge, remains unaffected by the variance.

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first and second pleas, and demurred to the last plea, assigning for cause—that it did not appear in or by the said last plea, that the said bill of exchange, in the first count mentioned, was accepted by the defendant before the said deed-poll was made by the plaintiff, or that the said deed-poll was made by the plaintiff after the defendant accepted the said bill of exchange; and that it was quite consistent with the allegations in the said first count, and in the said last plea, and with the said deed-poll, that the said bill of exchange was not accepted by the defendant until after the making and date of the said deed-poll; and also, for that the said deed-poll is untruly stated and described in the said last plea; and that in describing the said deed-poll, the names of all the parties to the deed-poll ought to have been stated in the said last plea, and that it ought to have truly appeared by and between whom the same was made; and also for that it appears that the said deed-poll does not refer to the said bill of exchange and cause of action in the said first count, the said deed-poll only referring to bills *made* by the defendant, and not to bills *accepted* by him.

Joinder in demurrer.

Spankie Serjt. in support of the demurrer. This plea is not pleaded with due precision. The deed-poll should have been pleaded as a release. But it applies only to a particular class of debts; for the recital in the deed-poll qualifies the general words which follow, and restrains its operation to debts under the fiat. The defendant, therefore, has not brought the debt for which he is sued in this action within the release. The deed-poll cannot apply to this bill of exchange, inasmuch as it is not averred in the plea that the bill was one of the debts intended to be released. The language of every plea is to be taken

fortius contra proferentem. (a) In numerous cases it has been decided that general words in a deed are controuled by the recitals : 6 *Bac. Abr.* tit. *Release*, (K.) (b), *Thorpe v. Thorpe* (c), *Cole v. Knight* (d), *Payler v. Homersham* (e), *Lampon v. Corke*. (g) Here the release is tied down to a particular subject-matter. In *Com. Dig.* tit. *Pleader*, (E. 6.), amongst other instances of construing the defendant's plea most strongly against him, it is said, "So if to a bond the defendant pleads payment, it shall be intended to be after the day if he does not say otherwise : " *Plowd. Comm.* 104 a. (h). That is much stronger than the present case. *Dendy v. Powell* (i) was also decided upon the maxim "*verba fortius accipienda contra proferentem.*" In *Wallis v. Harrison* (k) the court held that profert of a deed is not well excused by alleging that the deed was delivered to the adverse party, without going on to allege that he still retains it.

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Channell Serjt. contra. It may be admitted that where a deed is pleaded, and is set out on *oyer* by the opposite party, it must be taken as part of such previous pleadings. (l) It may also be admitted that the language of a plea is to be taken most strongly against the pleader. A release may be pleaded in two different ways. The deed of release may be set out at length, with an averment that the debt or demand was released by such deed, or the defendant may say that the plaintiff released the

(a) "The plea of everie man shall be construed strongly against him that pleaded it; for everie man is presumed to make the best of his own case." *Co. Litt.* 303. b.

(b) 5 *Bac. Abr.* 710., 6th and 7th edd.

(c) 1 *Lord Raym.* 235.

(d) 3 *Mod.* 277.

(e) 4 *M. & S.* 423.

(g) 5 *B. & Ald.* 606.

(h) By the justices, *arguendo*, in *Fulmenton v. Steward*.

(i) 3 *M. & W.* 442.

(k) 4 *M. & W.* 538.

(l) *Vide Smith v. Yeomans*, 1 *Wms. Saund.* 316.

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particular debt or demand. Here, in substance, the defendant has said that the plaintiff released him from the debt on which he now sues. [*Tindal* C. J. The defendant does not aver that the bill was accepted before the release. You say that if it had been pleaded that the plaintiff released the action, he might have replied *quod non relaxavit.*] *Cartwright v. Williams.* (a) The plaintiff should have new-assigned; or he should have replied in the nature of a new assignment. If the plea would have been good without the addition introduced by the replication, the plaintiff can only avail himself of the matter set out on oyer as falsifying the plea. [*Tindal* C. J. Suppose the plea had set out the release *in hæc verba*, might not the plaintiff have shewn that the debt, in controversy, was not within the terms of the release? The only point in dispute is, from which party the allegation should come.] It is alleged, as a fact, in the plea, that this was a release *of the bill.* [*Bosanquet* J. Suppose the release had appeared by the plea only, and that instead of setting out the deed upon oyer, the plaintiff had traversed the plea and had gone to trial, would this deed-poll have supported the plea?] The release was by deed-poll, and not by indenture. To raise the objection as to the co-relessors, the replication should have averred the fact of a releasing by them: *Cabell v. Vaughan.* (b)

Spankie Serjt., in reply. From this deed, as set out upon oyer, it must be taken that it was executed by all parties. [*Tindal* C. J. It is not made a condition.] It was the duty of the pleader to aver that the bill was accepted before the release. It was in point of law no bill until it was accepted. The allegation in the plea, as to the operation of a deed set out upon oyer in the replication, is to be rejected, and the language of the deed itself

(a) 2 *Stark. N. P. C.* 340.(b) 1 *Wms. Saund.* 290.

is alone to be regarded. Here, if the deed be read without the plea, the release will appear to apply to a different matter. There is no averment on this record, to shew, that the release does apply to the cause of action stated in the declaration.

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TINDAL C. J. It appears to me to be unnecessary to consider one point which has been raised in the course of the argument, namely, whether an allegation respecting the operation of the release upon the defendant's acceptance of the bill, should come from the plaintiff or from the defendant. It is here assigned as cause of special demurrer, that the plea does not state that the bill was accepted by the defendant before the deed-poll was made by the plaintiff. Consistently with the allegations on this record, the bill may have been accepted after the execution of the release.

BOSANQUET J. I am of the same opinion. It is not necessary to go into the question whether the allegation respecting the operation of the bill should come from the one party or from the other. The omission of such an allegation, if proper to be inserted, would, however, be merely ground of special demurrer, and no such cause of a demurrer has been assigned.

COLTMAN J. A release can only be of an existing debt, or of a cause of action which has some inception at the time the release is executed. It cannot be inferred from the allegation that the plaintiff was the holder of the bill at the time that the release was made, that this bill was accepted at the time of the making of the release. The plaintiff may have been the holder of a piece of paper not accepted.

Judgment for the plaintiff.

1840.

inst 585

CHARLES WYNNE v. JULIUS WYNNE, and SARAH,
his Wife.

A rent-charge is devised to *A.* so long as her conduct and behaviour shall be discreet, and meet with the approbation of *J. S.* The discreteness of the conduct and behaviour of *A.*, and the approbation of *J. S.*, are conditions subsequent, compliance with which need not be averred in a plea alleging the continuance of the rent-charge.

An avowry for a rent-charge devised to *A.*, the wife of *B.*, may be made by *B.* and *A.* in the right of *A.*

So, although the rent-charge issue out of a term of years ;
semble.

REPLEVIN. The defendants avowed, in the right of the defendant *Sarah*, alleging that, before the plaintiff had any estate or interest in the mansion mentioned in the declaration, and in which, &c., one *Robert Watkin Wynne* was seised thereof, *inter alia*, in his mesne as of fee ; and that being so seised, before the said time when, &c., and before the plaintiff had any estate or interest in the mansion in which, &c., to wit, on the 15th October, A. D. 1805, the said *R. W. Wynne* duly made, signed, and published his last will and testament in writing, in the presence of, and attested and subscribed by, three credible witnesses, according to the form of the statutes, &c., and thereby appointed the testator's wife, *Ann Sobieski Wynne*, the Rev. *David Hughes*, *William Dod*, *John Wynne Griffith*, *Robert Williams Wynne*, and *Edward Lloyd*, to be trustees, as therein mentioned, and gave and devised the mansion in which, &c., unto them their executors and administrators, for a certain term therein mentioned, to wit, 500 years, to the use, intent, and purpose (amongst other things), that his said wife should and might have and receive thereout a certain annuity, or yearly rent-charge, therein mentioned, clear of all taxes and other outgoings, during her natural life, payable half yearly, the first payment thereof to be made at the end of six calendar months next after the day of his decease, and every other succeeding payment accordingly ; and the testator, in and by his said will, declared that he gave to his said wife the usual powers of distress, entry, and perception of rents and profits of

the mansion in which, &c., charged with the payment of the said rent-charge, when and as often as the same, or any half-yearly payment thereof, should be in arrear, or within twenty days after such arrear should accrue due. (a) And the testator did, in and by his said will, give and bequeath a certain other annuity, or clear yearly rent-charge, of twenty pounds, to the said *Sarah*, the wife of the said *Julius*, *during her life, or as long as her conduct and behaviour should be discreet, and meet with the approbation of the testator's wife, or which, in case of her death, should be approved of by the survivors or survivor of his said trustees*; and the testator thereby declared his will to be, that the said annuity or rent-charge, so given to the said *Sarah*, the wife of the said *Julius*, should, during the time when the same was payable, have (b) similar powers for obtaining payment thereof as were in and by his said will before given in relation to the annuity or rent-charge before devised by his said will to the testator's said wife, and that it should be paid and payable half-yearly at the time appointed for the payment of the said other annuity; and the testator thereby devised (amongst other lands and hereditaments) the said mansion, in which, &c., subject to the said term of 500 years, and to the said several rents-charge, to the use of the testator's son *John Wynne*, during the term of his natural life, upon such condition as therein mentioned, with divers remainders over; and the testator afterwards, and long before the said time when, &c., and before the plaintiff had any estate or interest in the mansion in the declaration mentioned, and in which, &c., to wit, on the 2d day of *March* A. D. 1806,

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(a) As to the right to enter, and hold the lands charged, until satisfaction of the arrears, see *Jemmot v. Cooly*, 1 *Lev.* 170.; 1 *Siderf.* 223. 261. 344.; *T. Raym.* 135. 158.; 1 *Wms.*

Saund. 112.; *Parkhurst v. Smith*, and others *v. Smith*, lessee of *Dormer*, in error, *Willes*, 327, 340.; *Hassell d. Hodson v. Gowthwaite*, *Ib.* 500.

(b) *Sic.*

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died so seised of the said mansion in which &c., without altering his said will as to the said several devises and bequests, or any or either of them. That the said *Robert Williams Wynne*, one of the said trustees in the said will named is still in life, but that the said wife of the said testator, and every other of the said trustees departed this life to wit, on the first day of *January* in the year of our Lord 1822. *That the conduct and behaviour of the said Sarah, the wife of the said Julius, during the life of the said wife of the said testator, were, in all respects, known to, and met with the approbation of the said wife of the testator, and were judged and deemed by her to be in all respects discreet ; and the said annuity or rent-charge, during her life, was always well and duly paid to the said Sarah ; and that the conduct and behaviour of the said Sarah, after the death of the said wife of the testator, were and have been and are in all respects known to and approved by the survivors and survivor of the said trustees, and by them and him, respectively, judged and deemed to be discreet ; and because a large sum of money, to wit, 50*l.* of the said annuity or rent-charge so devised or bequeathed as aforesaid to the said Sarah, the wife of the said Julius, for divers, to wit, two years and the half of another year, before then elapsed, commencing from a certain day more than six calendar months next after the decease of the testator, and ending on a certain day, to wit, the 2d day of *March*, A.D. 1839, before the said time when, &c., had become, and then was, in arrear and unpaid to the said Julius and Sarah his wife, in right of the said Sarah, and at the said time when, &c., had been and continued so in arrear for the space of twenty days and upwards, the said Julius and Sarah his wife, in right of the said Sarah, further well avow the taking of the said cattle, goods, and chattels in the said declaration mentioned, in and upon the said stable and harness-room of and*

belonging to the said mansion, and in which &c., and justly, &c., as, for, and in the name of, a distress for the arrears of the said annuity or rent-charge so devised and bequeathed to the said *Sarah* as aforesaid; and which still remain due and unpaid. Verification, and prayer of judgment and return.

Special demurrer to the avowry, shewing for cause, —

First, that the defendants have not, by any certain or sufficient allegation therein, shewn that the defendants were, at the time or times when the said sum of 50*l.* is alleged to have accrued due, entitled under the said will to have and receive the same or any part thereof; for that, although the defendants have alleged that the conduct and behaviour of the defendant *Sarah* during the life of the said wife of the testator were in all respects known to, and met with the approbation of, the said wife of the testator, and were judged and deemed by her in all respects discreet, yet the said avowry does not contain any positive allegation, or in any manner shew, that the conduct of the said *Sarah* was actually and positively discreet, either in the lifetime of the testator's wife or afterwards; in the absence of which, or an equivalent allegation, upon the face of the avowry as it now stands (with the partial and imperfect averment contained therein of the existence of circumstances supposed to be necessary to shew a continuing title to the said annuity), the presumption is, that the conduct of the said *Sarah* was not discreet, and that the title to the annuity had ceased before the time when, &c.

Secondly, that, inasmuch as the title to the annuity, both in the lifetime of the testator's wife and afterwards, depended on the fact of the said *Sarah* being at all times discreet in her conduct and behaviour, and, according to a proper construction of the will, the annuity was payable only so long as the conduct and behaviour of the said *Sarah* were and continued to be

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discreet, it was incumbent on the defendants, in setting up a right inconsistent with and derogatory to the plaintiff's admitted title to the mansion in which &c., to shew in all things a good and continuing title in themselves, to authorise and enable them to enter upon the same and do the acts complained of; which they have at most done only by inference, and not by averment.

Thirdly, that inasmuch as the annuity of 20*l.* was given by the testator immediately to the said *Sarah*, she then being the wife of the said *Julius*, without any limitation to, or intervention of, trustees, the said annuity and all remedies for the recovery thereof, vested in the said *Julius* during his lifetime, and the defendant *Sarah* had no further power or authority to act or interfere in the taking of the said cattle, goods, or chattels, during the life of the said *Julius*, than as his bailiff, servant, or agent, and that she should therefore have justified as such bailiff, servant, or agent, and not in her own right; and that, upon the defendants' own shewing, the defendant *Julius* should and ought to have justified in his own right absolutely, and not in right of his wife.

Joinder in demurrer.

Halcombe Serjt. in support of the demurrer. The avowry is defective both in substance and in form. The first, and most important, of the plaintiff's objections to the avowry, arises upon the construction of the devise. It is submitted, if due effect be given to the language of the will, the allegations in the avowry will be found to shew no subsisting right to the annuity. The statement in the avowry is, that the conduct and behaviour of the said *Sarah* during the life of the wife of testator were in all respects known to, and met with the approbation of, the wife of the testator, and were judged and deemed, by her, to be in all respects discreet, and that the conduct and behaviour of the said *Sarah*, after the death of the wife of

the testator, were and have been, and are, in all respects known to and approved by the survivors and survivor of the trustees, and by them and him respectively judged and deemed to be discreet. It should have been averred that her conduct was *in fact* discreet. It will perhaps be contended, that it was sufficient, after the death of the wife of the testator, that the conduct of *Sarah Wynne* should be approved of by the trustees; but this is a violent construction, and evidently inconsistent with the intention of the testator, whose object would be to guard against any indiscretion on the part of his son's wife; in which view it would be immaterial whether the wife of the testator was alive or not. Discreetness of conduct and behaviour is not too vague a condition to be enforced. In *Tattersall v. Howell* (a) a legacy was bequeathed upon condition that the legatee should give up his course of life, and give up frequenting public houses, drinking to excess, and keeping low company, Lord *Eldon* recognised the validity of the condition, and referred it to the master to inquire, and state to the court, whether the plaintiff had discontinued, and how long, frequenting public houses, drinking to excess, and keeping low company. In *Lawless v. Shaw* (b), a legacy to "industrious poor" was held to be sufficiently certain. A condition ought to be performed strictly and *bonâ fide*: *Com. Dig. tit. Condition* (G. 13.), *Com. Dig. tit. Pleader* (C. 58.)

Even in point of form, the avowry is wrong. The right of receiving this annuity during the coverture vested in *Julius Wynne*, the husband. He, therefore, only, ought to have avowed; and *Sarah Wynne* should have made cognizance, as bailiff to her husband. (c)

Manning Serjt. contra. It was not incumbent on the defendants to shew a performance of the condition, and

(a) 2 *Meriv.* 26. 29.

(b) 1 *Lloyd & Gould*, 154.

(c) In the case supposed she might have pleaded *non cepit*.

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Upon the first point the known distinction between conditions precedent and conditions subsequent is relied on. Where the condition is precedent, the estate is not in the grantee until the condition be performed; but where the condition is subsequent, the estate vests immediately in the grantee, and remains in him until the condition be broken; *Bro. Abr. tit. Condition*, pl. 67. (a) In *Ughtred's* case (b) the plaintiff, *Henry Ughtred*, brought a writ of annuity against *William*, Marquess of *Winchester*, son and heir of *John*, Marquess of *Winchester*, and declared that Marquess *John*, by his writing (c), constituted the plaintiff captain of the fort of *Netley*, to have and exercise that office, during the plaintiff's life; and gave him authority from time to time to appoint a master-gunner, a porter, and six soldiers, and that Marquess *John* did, for the considerations aforesaid, and for the better maintenance of the plaintiff and of the master-gunner, &c., in the defence of the said castle, for himself and his heirs, grant to the plaintiff an annuity of 82*l.*; and demanded 368*l.* for eleven years and a half in arrear. On demurrer to this declaration, it was insisted, that the plaintiff ought to have averred that he exercised the office, and had appointed a master-gunner, &c. After judgment for the plaintiff upon this demurrer, it was held by the Court of Queen's Bench upon a writ of error, that the declaration was good, without such an averment, "and their reason was, that in all cases

(a) Citing (the judgment of *Brudenell* C. J. of K. B.) 14 *H.* 8. fo. 17. (*H.* 14. *H.* 8. fo. 17. and 22.)

(b) 7 *Co. Rep.* 9 b.

(c) i. e. by deed-poll.

where an interest or estate doth commence upon a condition precedent, be the condition or act to be performed by the plaintiff or defendant or by any other, and be the condition in the affirmative or negative, there the plaintiff ought to shew it in his declaration, and to aver the performance thereof; for there the interest or estate doth begin in him by the performance of the condition, and is not in him till the condition be performed. But otherwise it is, when the interest or estate passeth presently, and vests in the grantee, and is to be defeated by matter *ex post facto*, or condition subsequent, be the condition or act to be performed by the plaintiff, or defendant, or by any other, and be the condition in the affirmative or negative, there the plaintiff may declare generally, without shewing the performance thereof, and it shall be pleaded by him who will take advantage of the condition or matter *ex post facto*; for every one ought to allege that which makes for him, and which is for his avail, and none shall be forced to allege that which is against himself. And it may well be, that the condition subsequent, or matter *ex post facto*, stands upon many parts, to rehearse all which would be tedious, when issue shall be taken but upon one of them, and the defendant may plead any one of them which he pleaseth in bar of the action; and so the pleading will be more short and compendious, which is the most commendable, if it be sufficient. Here, in the case at bar, the condition was to be performed by the plaintiff himself, and therefore the case is the stronger; but because the plaintiff by the said grant was presently seised of the said office and annuity for the term of his life, which ought to be defeated by the not using the said office or other subsequent matter, the subsequent matter makes against him, and therefore shall be pleaded by the defendant." Lord Coke then

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refers to the case in 15 *H.* 7, fo. 1. (a), which is thus noticed by *Pollard* Serjt. in his elaborate argument in *Colthirst v. Bejushin* (b), “And therefore in 15 *H.* 7., in the first case, it is held in a writ of annuity, that if I grant to one that *when* he shall be promoted to a benefice he shall have an annuity, then, if he demand the annuity, he ought first to shew that he is promoted to a benefice; but if an annuity be granted to a man *until* he be promoted to a benefice, there he shall have a writ of annuity, and shall not shew that he is not yet promoted to a benefice; because the annuity doth precede, and the promotion is subsequent, and goes in defeasance of the annuity; and therefore it ought to be shewn on the contrary side.” (c) [*Tindal* C. J. An estate is granted to a woman, *dum sola et casta vixerit*: from which side should the allegation come?] From the party seeking to defeat the estate; which vests immediately, subject to be defeated by marriage or by incontinence. Celibacy or widowhood, and chasteness, are negative states, which must be presumed to exist, until the contrary is shewn by the party setting up marriage or incontinence.

But independently of the presumption in favour of celibacy and chastity, marriage or incontinence is matter arising *ex post facto*; and all matter *ex post facto*, whether in the affirmative or in the negative, and whether to be performed on the part of the plaintiff or on that of the defendant, ought to be alleged by the party seeking to defeat the estate. (d) A grange and farm were leased to *A.* and *M.* his wife for life, remainder to *B.* their son for life, *si ipse* (*B.*) *inhabitare*

(a) *H.* 15 *H.* 7, fo. 1, pl. 1. In that case the exceptions taken *ore tenus* to the declaration being over-ruled, the defendant did not demur, but pleaded that a benefice had been tendered to the

plaintiff, which the latter refused.

(b) *Plowd.* 21.

(c) *Ibid.* 25 b.

(d) *Com. Dig.* tit. *Pleader* (C. 57.).

vellet et residens esset infra prædictam grangiam et firmam.

This was held to be, not a condition precedent, but a condition subsequent. (a) *A.* devised a house to *B.*, and if *B.* died before *C.*, then that *C.* should have it upon such composition as should be thought fit by *A.*'s executors. *A.* died, then *B.* It was agreed that the life estate of *C.* was precedent, and the condition subsequent; and that the agreement might be made with *C.* at any time. (b) In *Popham v. Bampfeyld* (c), the testator devised lands to *A.* and *B.* for payment of debts, and, after payment of the debts, in trust for the use and benefit of *C.* and his heirs male, but declared his will to be, that *C.* should have no benefit of the devise unless his father should settle such and such lands upon *C.*; in default whereof he devised the lands to *A.* and *B.* This was held to be a condition subsequent. It has been held that, that which may be a condition precedent in a deed may be a condition subsequent in a will, *Jennings v. Gower*. (d) It is, however, unneces-

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(a) *Plowd.* 23 a.

(b) *Woodcock v. Woodcock*,
Cro. El. 795.

(c) 1 *Vern.* 79. 83.

(d) *Cro. El.* 219. This distinction was taken by *Kingsmill* and *Conisby* Serjts. in *Keilwey*, 43 b., who laid down this principle, which appears to have been considered as free from doubt,—that every will must be construed in the widest manner it can reasonably be, for the benefit of the soul of the testator. By which, it is presumed, we are to understand, that in expounding a will that construction ought to be adopted which would be most consistent with the presumption that the testator had not omitted to make a just and pious disposition of

his personal estate, and of any real property of which others were seised to the uses of his will.

In the following century, the same difference of construction was retained; but as the power of devising lands of which the testator died seised had been introduced, and a religious system exercising less direct control over testamentary dispositions prevailed, it became necessary to find out a new reason to support the distinction between the rules of construction which were to govern a conveyance by feoffment or grant, and a conveyance by devise. This was supposed to be discovered in the presumed *inopia consilii* of testators; though

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sary to resort to any such distinction in the present case, inasmuch as the condition, whether it be taken to be the conduct of the annuitant, as contended by the plaintiff, or the approbation of the wife and the trustees, as will be urged for the defendants, is by matter *ex post facto* or subsequent. If this be so it was unnecessary to allege any performance of this condition subsequent; and the allegation not being material, is surplusage. The allegation of the performance of a condition precedent is traversable, because it is material; but the allegation of the performance of a condition subsequent, not being material, is not traversable, and may be wholly rejected: *Conustable v. Clowbury*(a), *Jenkins*, 260. pl. 59., *Edwards v. Hammond* (b), *Scatterwood v. Edge*(c), *Plowd.* 30 a., 32 b., 2 *Stark. Evidence*, 686. 2d ed.

But even supposing the condition to be a condition precedent, a sufficient performance is shewn in the avowry. (Here he was stopped by the court, who called upon *Halcombe* Serjt. to answer the argument as to the condition being subsequent, and, as such, requiring no averment of performance. This the learned serjeant admitted that he was not prepared to do, stating that the point had come upon him by surprise.)

TINDAL C. J. We think that the authorities which have been cited for the defendants are very strong; but the plaintiff may amend by withdrawing his demurrer,

in other nations, actual *inopia consilii* appears to be no otherwise regarded than as a ground for rejecting the testamentary disposition altogether.

(a) *Noy*, 75. That case, besides the point for which it is here cited, bears a verbal resemblance to the principal case, which is fallacious; the term "wife," which is found therein being evidently inserted by mis-

take. See *Constable v. Clobberie, Palmer*, 397.; *Abbott, L. S.*, by *Shee*, 234. Throughout the report in *Noy*, "ship" should be substituted for "wife." In the notes originally taken by *Noy*, the word would probably be "nief," which might be rendered either "ship" or the "wife of a villein."

(b) 3 *Leon.* 132.

(c) 1 *Salk.* 229.

and pleading in bar to the avowry, upon payment of costs. (a)

Judgment for the avowants, unless the plaintiff plead in bar of the avowry, and pay the costs of the amendment, within a fortnight.

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(a) Nothing was said by the court as to the third objection taken by the plaintiff,—that the avowry should have been made by the husband in his own right. This objection must, however, it is conceived, be considered as overruled; since, if tenable, it would have been sufficient to support the demurrer.

Taking the devise to *Sarah Wynne* as dependent on, and limited by, the term of 500 years, she would have only a chattel real, which her husband might (for his own benefit, in the absence of any trust express or implied,) reduce into possession. But until such reduction into possession, the avowry would, it is conceived, be more properly made in the right of the wife, in whom, in the event of the death of the husband pending the suit, the whole interest in the suit would vest. *Plowd.* 418.

The estate of *Sarah Wynne* in the rent-charge would be a freehold, if the devise be considered as made for her life, subject only to be defeated by the non-performance of the condition; and the husband, though seised with the wife in her right, and entitled to receive the arrears for his own benefit, (subject to any trust which could be raised,) would have no disposing power over the rent-charge; and he might avow either alone or jointly with his wife; *Wise v. Bellent*, *Cro. Jac.* 442.; *Osborne v. Walleeden*, 1 *Mod.* 272. That any interest

in land of uncertain duration (though not expressed to be for life), determinable by matter subsequent, which (per *Brooke J. M.* 14 *H.* 8, fo. 13 a.) is the subject of human agency (as where it is determinable at the will of a stranger), constitutes a freehold for life, see *Bracton*, lib. iv. tract. i. c. 28. fo. 207 a.; 3 *Ass.* fo. 5, pl. 9.; *Vavisor's Case*, 11 *Ass.* fo. 29, pl. 8.; *Burton v. Berton*, 17 *Ass.* fo. 49, pl. 7.; *Abraham v. Brokesby*, P. 19 *H.* 6, fo. 67, pl. 14.; *T.* 35 *H.* 6, fo. 63, pl. 3.; *T.* 37 *H.* 6, fo. 26, pl. 1.; *M.* 7 *E.* 4, fo. 16, pl. 10.; *M.* 20 *E.* 4, fo. 9, pl. 4.; *M.* 21 *H.* 7, fo. 38, pl. 47.; *M.* 14 *H.* 8, fo. 13, 14.; *Littleton*, s. 250, 381.; *Co. Litt.* 42 a. 56 a. 214 b. 218 a.; 4 *Co. Rep.* 30.; *Dyer*, 300 b.; *Allen v. Hill*, *Cro. Eliz.* 238.; *Cordell's Case*, *Ibid.* 315.; 8 *Co. Rep.* 96 a.; *Paget v. Dr. Vossius*, 1 *Ventr.* 325.; 2 *Lev.* 191.; *T. Jones*, 73.; 2 *Mod.* 223.; 3 *Keble*, 779.; *Blamford v. Blamford*, 3 *Bulstr.* 100.; *Cadee and Oliver's Case*, 3 *Leon.* 157.; *Havergall v. Hare*, *Poph.* 126, 127.; *Cro. Jac.* 510.; *Shepp. Touchst.* 270.; *Brewer v. Hill*, *Anstr.* 114.; *Hewlins v. Shipham*, 5 *B. & C.* 229.; *Bro. Abr. Lease*, pl. 67.; *Com. Dig. Estate (E. 1.)*; *Bac. Abr. Estate for Life (A.)*; 10 *Vin. Abr.* 288, 289, 294, 295.; 2 *Bla. Comm.* 121.; 2 *Hayes, Introd.* 38. n.; *Preston Est.* 405.

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The declaration set out a contract, whereby the plaintiff agreed to employ the defendant in his service, and the defendant agreed to serve the plaintiff in his business, for one month certain, and until the expiration of a

ASSUMPSIT. The declaration stated that, therefore, to wit, on the 24th day of *October* 1836, by a certain agreement in writing then made by and between the plaintiff of the one part, and the defendant of the other part; after reciting that the plaintiff had, at the request of the defendant, agreed to employ and retain him in his service as a general servant, upon the terms, conditions, restrictions, and engagements thereafter contained, the plaintiff did thereby agree to keep and retain in his service the defendant as such general servant, and the defendant did agree to enter into such service, and to serve the plaintiff, his executors, administrators, assigns, co-partners, or successors in the month's notice, to be given by either party. In consideration whereof the defendant did thereby agree, that he would not, during the continuance of such service, nor within the space of twenty-four months *after quitting or being discharged from the same*, commence, &c. the business of a cowkeeper within five miles from *Northampton Square*, in the county of *Middlesex*; and if at any time during such service, or within twenty-four months *after the determination thereof*, the defendant should commence, &c. such business, that he would pay 10s. for every day that he should act contrary to the agreement. The declaration then averred, that the defendant entered into the plaintiff's service, and continued therein until, &c., when he *quitted and was discharged from the same*; and although the plaintiff had always performed and fulfilled the agreement in all things therein contained to be performed on his part, yet the defendant did not perform the said agreement, &c., — stating the breach to be, that the defendant did commence, &c. such business within the specified time and space.

Plea, that the plaintiff did not give to the defendant, nor the defendant to the plaintiff, a month's notice in writing, to determine the contract and service, concluding with a verification.

On demurrer to this plea it was held bad.

Held also, that the general allegation of performance of the agreement by the plaintiff in the declaration was sufficient on general demurrer; and also, that if the defendant had been improperly discharged by the plaintiff, such wrongful discharge was no answer to the action, but would be merely the subject of a cross-action.

Held further, that the agreement was valid, being limited both in time and space, and not appearing to be an unreasonable restraint of trade.

business of a cow-keeper, for one month certain from the date thereof, and until the expiration of a month's notice to be given by either party to the other of them in writing, of his or their intention of determining the said contract at the end of such month, at such wages as might from time to time be agreed upon. In consideration whereof, the defendant did thereby agree, that he would well and faithfully serve the plaintiff or his future co-partner or co-partners, executors, administrators, assigns, or successors in the said business of a cowkeeper, and would not, during the continuance of such service, or within the space of twenty-four calendar months after quitting, or being discharged from, the same, commence, carry on, or be concerned, in any way whatsoever, either as servant or master in the trade or business of a cowkeeper, milk-man, or milk-seller, or milk-carrier within the distance of five miles from *Northampton Square*, in the county of *Middlesex*; and as a further security for the due observance and performance of the said agreement on the part of the defendant, he, the defendant, did thereby agree, that if at any time or times during the said service, or within twenty-four calendar months after the determination thereof, he, the defendant, should commence or carry on, or be concerned in the trade or business of a cow-keeper, &c., in any way whatsoever, either as a servant or master within the distance of five miles from *Northampton Square* aforesaid, he, the defendant, would pay unto the plaintiff or his future co-partner or co-partners, executors, administrators, assigns, or successors, the sum of 10s. for each and every day that he, the defendant, should act contrary to that his said agreement; every such sum or sums of money to be considered as liquidated and ascertained damages, and to be recoverable by action or actions at law, to be brought by the plaintiff or his future co-partner or co-partners,

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&c. in the same trade, without proving or being required to prove any special or other damage. Mutual promises. Averment: that the defendant did afterwards, to wit, on, &c., enter into the plaintiff's said service as a general servant, as agreed on as aforesaid, and the plaintiff then retained and employed him therein, and the defendant continued in such service for a long time, to wit, until the 1st day of *October* 1839, when the defendant quitted, and was discharged from, the same; and although the plaintiff hath always, from the time of making the said agreement, performed and fulfilled the same in all things therein contained to be performed on his part, yet the plaintiff in fact says, that the defendant did not nor would perform the said agreement or his promise, but thereby deceived the plaintiff in this, to wit, that within the space of twenty-four calendar months after his quitting, and being discharged from, the said service as aforesaid, to wit, on the 2d day of *October* 1839, and on divers other days and times afterwards, to wit, on each succeeding day between that day and the commencement of this suit, making together, divers, to wit, 184 days, he, the defendant, did commence, carry on, and was concerned in as master in, the trade and business of a milkman, within the distance of five miles from *Northampton Square* aforesaid, contrary to the form and effect of the defendant's said agreement in that behalf. And that by means of the premises the defendant became liable to pay to the plaintiff the sum of 10s. for each and every day, &c.

Seventh plea. That he, the plaintiff, did not give to the defendant, nor did the defendant give to the plaintiff, a month's notice in writing of an intention of determining the said contract and service at the end of such month, according to the effect of the said agreement in that behalf. Verification. (a)

(a) Negative pleas need not be averred, *Bodenham v. Hill*, 7 M. & W. 274., and see *antè*, Vol. I. 288n. 806(a), (b).

Special demurrer — assigning for causes — that the said seventh plea neither traverses, nor confesses and avoids any allegation in the declaration; and that if it be intended as a traverse of the allegation, that the defendant quitted and was discharged from the plaintiff's service, it ought to have concluded to the country; and that it is bad for not traversing other modes of quitting or being discharged from the plaintiff's service in the declaration mentioned; and that it is pregnant with an affirmative, that the defendant did quit or was rightfully discharged from the service of the plaintiff; and that it, at most, amounts to an argumentative denial of the defendant's having quitted or being discharged from such service, and is therefore bad for argumentativeness, &c.

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Joinder in demurrer.

Channell Serjt. in support of the demurrer. The first objection to the plea is, that it neither traverses nor avoids any allegation in the declaration. But, if meant as a traverse, it should have concluded to the country. Also, should the plea be intended as a denial, that the defendant was rightfully discharged, it is bad for argumentativeness. The plea, moreover, is bad in substance; for even supposing that the defendant had not received a month's notice to quit the plaintiff's service, and had been wrongfully discharged, that would have been no answer to the present action; the defendant's remedy would be by a cross action.

Stephen Serjt. contra. There are two objections to this declaration. First, the agreement on which it is founded is void, being in restraint of trade; and, secondly, no sufficient breach of the agreement is alleged. With respect to the first objection, the cases on the subject are numerous, and not easy to be reconciled; but the prin-

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ciple to be deduced from them is, that all general restraints of trade are bad, however short the time for which the restriction is to last. In *Ward v. Byrne* (a), a bond was held void on this ground, although the restriction was only for nine months; and the reasoning of the court proceeded on the assumption that all general restraints of trade are unlawful. The law allows of an exception from this general rule; but any one relying upon it must bring himself clearly within it. The exception which seems to be established is, that not only shall the restraint from carrying on any particular trade be confined to a given place, but the limit assigned must be absolutely necessary for the protection of the party by whom it is imposed. If this be so, then it is clear that the plaintiff has not, in this declaration, brought himself within such exception. It may be admitted that, since the decision in *Hitchcock v. Coker* (b), over-ruling to that extent *Horner v. Graves* (c), inadequacy of consideration can no longer be set up. In the latter case, however, the court principally relied on the circumstance, that the restriction imposed on the defendant, of not practising as a surgeon-dentist at or within 100 miles of *York*, was much larger than was required for the protection of the plaintiff. Much will depend in every case upon the nature of the occupation. [Maule J. Can the court take judicial notice of that?] It is submitted that it may. The difficulty suggested will attach in almost every case. [Tindal C. J. No; for cases of this nature generally arise after a trial at nisi prius, at which evidence has been given as to the nature of the particular trade. Maule J. Is there any case except *Horner v. Graves* in which the court have decided this question solely upon the record?] In

(a) 5 M. & W. 548.

(b) 6 Ad. & E. 438.

(c) 7 Bingham 735., 5 Moore & P. 768.

Hinde v. Gray (a) it arose also upon the record. [*Tindal* C. J. What is the ordinary diameter of a milk-walk?] It is not necessary for the court to decide that. This is not a mere question as to the extent of the locality. It must be obvious to the court, as well as to the rest of the world, that it is utterly impossible for a milkman to supply the district embraced within the limit here assigned of five miles round *Northampton Square*, containing probably two millions of inhabitants. [*Maule* J. You say that the court is to decide this question, involving a question of fact? *Tindal* C. J. How do we know that the plaintiff does not keep a horse and cart, and carry milk to a great distance?] It is most unreasonable that because the plaintiff may have 200 customers throughout this immense district, he is to restrain parties from supplying two millions. [*Tindal* C. J. You cannot draw the line closely: the plaintiff ought not to be prevented from increasing the number of his customers.] Where the consideration for the restraint is the assignment of the goodwill of a trade, then of course the restriction may reasonably extend over the whole district in which the customers reside; but this is a different case. [*Maule* J. Does not that argument bring the question back to inadequacy of consideration, which has been disposed of by *Hitchcock v. Coker*?] Where a man has sold a business extending throughout a certain district, he has estopped himself from saying that the district is too large. [*Maule* J. Can a man estop himself from saying that a contract is void on the ground of public policy?] There is a wide distinction between a case where the consideration is the goodwill of a business, and one like the present, to which the same reasoning will not apply. [*Tindal* C. J. The plaintiff may have dispersed

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(a) *Antè*, Vol. I. 195.

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customers living five miles from his house. The object of the restriction was to prevent the defendant from running away with the plaintiff's customers. Is there any thing unreasonable in that?] When strictly considered there is. The plaintiff should have restrained the defendant from selling milk in particular streets or districts, or to his customers. [*Bosanquet* J. The restriction either is legal, or it is not. What have we to do with the consideration?] Where the attempt is to establish an exception to the general rule, it is important to look at the consideration. In *Hitchcock v. Coker*, where the Exchequer Chamber, reversing the judgment of the King's Bench, held that an agreement whereby the defendant, on being taken into the service of the plaintiff, a druggist, as an assistant, agreed that if he should, at any time thereafter, exercise the trade or business of a chemist and druggist in the town of *T.*, or within three miles thereof, he should pay the plaintiff 500*l.* as liquidated damages, was valid, there being a legal consideration for the contract, and that the restraint was not shewn to be unreasonable by the circumstance that its duration was not limited to the life of the plaintiff, or to the time during which he should carry on the business. *Tindal* C. J. there says, "The ground upon which the court below has held this restraint of the defendant to be unreasonable, is, that it operates more largely than the benefit or protection of the plaintiff can possibly require; that it is indefinite in point of time, being neither limited to the plaintiff's continuing to carry on his business at *Taunton*, nor even to the term of his life. We agree in the general principle adopted by the court, that where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must

be therefore void. But the difficulty we feel is in the application of that principle to the case before us." [Maule J. That case shews that a servant may be restrained from carrying on trade within the limit or extent of the goodwill of his employer's business; as he might interfere with such goodwill. *Tindal* C. J. How can you shew that we know sufficient of this case to say that the restriction is unreasonable?] There seems no reason why the court may not take notice of the nature and populousness of the district to which the restraint applies. [Coltman J. In *Hayward v. Young* (a), a bond restraining the defendant from practising as an apothecary within twenty miles of *Aylesbury* was held valid.] That was the case of a sale of goodwill, as was also *Bunn v. Guy*. (b) No authority can be found sanctioning such a restraint as this, except where there has been a sale of a goodwill. If it be said that it does not appear on the record that the district in question embraces such an immense population, the answer is, that it is for the plaintiff to shew the contrary, for *prima facie* every contract in restraint of trade is illegal. The defendant being within the rule, and the plaintiff relying on the exception, it is incumbent on the latter to bring himself within such exception. In *Ward v. Byrne* (c) Gurney B. says (d), "Generally speaking, restraints of trade are unlawful; but there may be a partial restraint, provided there be a good consideration." And Rolfe B. says, "The general policy of the law is against these restrictions; and it is only in deference to the convenience of the trading part of the community that certain exceptions to the general rule have been allowed." Here, it appears that the defendant is restrained from carrying on his business; and it is for the

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(a) 2 Chitt. Rep. 407.

(b) 4 East, 190.

(c) 5 M. & W. 548.

(d) 5 M. & W. 563.

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plaintiff to shew that the restriction is reasonable. [*Bosanquet J.* Does a declaration ever contain such an allegation?] Until lately the law has been uncertain upon the point: it would now only be prudent, in setting out such a restriction, to aver that was a reasonable one. [*Tindal C. J.* We are not to presume that the contract is unlawful. Such an allegation is not usual; and if you meant to insist upon the point you should have demurred specially.] *Young v. Timmins* (a), though in part overruled by *Hitchcock v. Coker*, is an authority for the defendant. In *Archer v. Marsh* (b) the party had sold a business; which distinguishes it from this case. In *Leighton v. Wales* (c), where the parties had agreed to become partners in running a coach between *London* and *Croydon*, a restriction preventing the defendant, in the event of a dissolution of partnership, from running coaches, except at particular hours, on the same road, was held valid. So here, the plaintiff should only have restrained the defendant from selling milk in the particular streets where his customers lived. The court cannot decide against the defendant without overruling *Horner v. Graves*.

With respect to the second point, it is submitted, either that the plea is good or the declaration is bad. By the agreement set out, the defendant was to serve the plaintiff "for one month certain from the date thereof, and until the expiration of a month's notice to be given by either party;" in consideration whereof the defendant agreed that he would not, "within the space of twenty-four calendar months after quitting or being discharged" from the plaintiff's service, carry on the trade of a milkman, &c. It is not averred in the declaration that the defendant was discharged after a month's notice; and the plaintiff is therefore not entitled to have

(a) 1 *Tyrwh.* 226., 1 *Cro.*
 & *J.* 331.

(b) 6 *Ad. & E.* 959.
 (c) 3 *M. & W.* 545.

it presumed in his favour that the contract was lawfully determined. The declaration alleges that the defendant entered the service of the plaintiff, who retained and employed him therein ; which averment would be satisfied by the defendant's remaining in the plaintiff's employment for a single day. It goes on to state that the defendant continued in such service for a long time, to wit, &c., which means nothing. It is then averred that the defendant quitted and was discharged, without stating how he came to quit, or why he was discharged. The contract, therefore, being for one month certain and until the expiration of a month's notice, the declaration should have averred that the defendant was employed for that period ; and, not having done so, it contains no sufficient allegation of performance on the part of the plaintiff. The plea confirms and enforces the defects in the declaration ; and the formal objections to the plea are immaterial, if it be in substance an answer to the declaration. It is, in point of fact, a confession and avoidance of the declaration. It confesses every thing alleged in the declaration, but adds another fact, namely, that the plaintiff did not give the defendant a month's notice. If this be so, the defendant did not enter into any contract, that if he was improperly discharged he would refrain from carrying on the trade of a milkman. [*Maule J.* Do you say that if the defendant were discharged for misconduct, he could set up for himself?] No : it may be admitted that he could not take advantage of his own wrong. The only question is, whether that fact should not have been alleged in the declaration. It is only averred that he was discharged ; and the court will not presume that it was in consequence of misconduct. The plea states that the plaintiff did not give him a month's notice ; to which, if the fact were so, the plaintiff should have replied, that he discharged him for misconduct. [*Maule J.* You are now upon the plea. If you

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shew that it negatives one mode of discharge, it ought to negative the existence of any other, as by the servant saying to his master, "I give you a month's notice," and the master replying, "You may go to-day." The question, therefore, comes back to the declaration, in judging of which it is not material to consider whether the plea is good.] It is submitted that the declaration is bad, on two grounds: — first, it contains no sufficient allegation of performance of the agreement on the part of the plaintiff; for as the consideration for the agreement by the defendant was his employment and retainer for a month certain, it should have been distinctly averred that he was employed and retained for that period. The argument as to the defendant's bringing a cross action only applies where there are independent covenants by both parties. (a) Secondly, the declaration is defective in not alleging that the defendant quitted and was discharged from the plaintiff's service according to the terms of the contract. It will be said that the allegation is as broad as the contract; but it is not sufficient for the plaintiff to bring himself within the words, he must bring himself within the substance and spirit, of the agreement. *Allein v. Randall*. (b) Here, it should have been alleged, either that the month's notice had been given, or that the defendant had been discharged for misconduct, or that the service had been put an end to by consent; in which last case it would be by no means clear that the agreement would have continued in force.

Channell Serjt., in reply, was stopped by the court.

TINDAL C. J. Two objections have been made to this declaration, on which it is necessary to fall back; one of these being mere matter of form, the other involving a question of general principle. The first ob-

(a) *Kemble v. Mills*, *Ante*, Vol. I. 357. (b) *Yelv.* 49.

jection is, that the breach in the declaration is not sanctioned by the agreement into which the defendant entered. The contract set out in the declaration is, that "the plaintiff did thereby agree to keep and retain in his service the defendant as such general servant, and the defendant did agree to enter into such service, and to serve the plaintiff, his executors, &c. in the business of a cowkeeper for one month certain from the date thereof, and until the expiration of a month's notice, to be given by either party to the other of them in writing of his or their intention of determining the said contract at the end of such month, at such wages as might from time to time be agreed upon." The declaration then alleges that the defendant, in consideration of such agreement, did thereby "agree that he would well and faithfully serve the plaintiff or his future co-partner or co-partners, executors, &c. in the said business, and would not, during the continuance of such service, or within the space of twenty-four calendar months after quitting or being discharged from the same, commence, carry on, &c., either as servant or master, in the trade or business of a cowkeeper, &c. within the distance of five miles from *Northampton Square*, in the county of *Middlesex*." Now, it is said that the breach does not state that the defendant was discharged after a month's notice in writing; but when the part of the agreement which I have just read is looked at, it will be seen that the words are not "after quitting or being discharged from the same *in manner aforesaid*;" but "after quitting or being discharged *from the same*," not alluding at all to the manner in which the service is to be determined. And I have no doubt that the words "in manner aforesaid" were advisedly left out; for if the defendant were discharged for misconduct, it was never intended that he should be let into the defence now attempted to be set up. When the agreement goes on to impose a forfeiture in case the

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defendant should break his part of the agreement, the terms used are still more general. “And as a further security &c., the defendant did thereby agree that if at any time or times during the said service, or within twenty-four calendar months *after the determination thereof*, he, the defendant, should commence, &c., he should pay,” &c. These words are as general as they can be; and they give another interpretation to those before used, shewing it was intended that the defendant should be answerable for a breach of his agreement after the determination of the contract in any way whatever, whether through misconduct on his part or regularly under the terms of the agreement. The breach alleges that the defendant, within twenty-four calendar months “after his quitting and being discharged,” “did commence,” &c. I should rather say, from those words, that the contract was regularly determined. But if it was otherwise, and the defendant was discharged without a month’s notice, he should have brought a cross action, and not have relied upon that as a defence to the present suit. It is to be observed that the declaration contains a general allegation of performance of the agreement on the part of the plaintiff, and that I think is sufficient on general demurrer, and that the defendant cannot resort to the objection that the plaintiff has failed to perform his portion of the agreement.

With respect to the other objection, which involves a question of general principle, it is said that we are bound to see that this agreement, in restraint of trade, is unreasonable and void; and that if we do not come to that conclusion, we must overrule *Horner v. Graves*. But that does not seem to be a necessary consequence. I think the rule is properly laid down in *Hitchcock v. Coker*, where it is said that “where the restraint of a party from carrying on a trade is larger and wider than the protection of the person with whom the contract is made, can pos-

sibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must therefore be void." Although a contract restraining a party from carrying on the business of a dentist within 100 miles round *York* was decided to be unreasonable in *Horner v. Graves*, it does not follow that we are to hold in this case that a radius of five miles is also unreasonable. This must depend upon the population, the nature of the business, and how far it is ramified in that radius, and upon other circumstances of which we are not bound to take notice. Also I think that when we are deciding upon the unreasonableness of a contract of this kind, we cannot leave out of consideration the duration of the restraint; for, although I admit that where we once hold a restriction to be unreasonable in point of space, the shortness of the time for which it is imposed will not make it good, yet where the question is, whether the restraint is unreasonable or not, in point of space, that which would be unreasonable were it to continue for any length of time, may not be so when it is to last only for a day or two. I approve of the ruling in *Ward v. Byrne*, but I deny its application to the present case. I think that we cannot hold that the contract set out in this declaration is void, and that our judgment must be for the plaintiff.

BOSANQUET J. The first point for our consideration is mere matter of form — whether it was incumbent on the plaintiff to shew in the declaration, that the defendant was discharged in the way contemplated by the agreement. [The learned judge here read the first part of the agreement.] The objection is, that it does not appear that the plaintiff gave any notice in writing to the defendant, to determine the service. If it was the intention of the plaintiff to put an end to the service against the will of the defendant, he was to give

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the latter, a month's notice, but there might be other grounds which would justify the plaintiff in determining the contract besides those specified. The declaration then states, that "in consideration" &c., "the defendant did thereby agree," &c. [The learned judge here read the second part of the contract.] It has been very justly observed by my Lord Chief Justice, that the agreement does not say that "after quitting or being discharged *in manner aforesaid*," — but generally, that after quitting or being discharged, — the defendant shall not carry on the business. It seems to me that the intention was, that whenever the service was determined, however it might be put an end to, the defendant should not commence the trade of a milkman within the specified limits. The declaration goes on to aver, that the defendant entered the plaintiff's service, and continued until a certain time, when he "quitted and was discharged from the same." It appears to me, that the meaning to be attached to these words is, that the service was put an end to by the mutual consent of both parties, and that this brings the case within the terms of the agreement.

The next question is, whether the contract disclosed on the declaration is clearly so illegal that the court are bound to say that it shall not be enforced. I cannot see that it is illegal, being limited both in point of time and of space. The consideration for the restriction was, that the defendant should be taken into the plaintiff's service; and the manifest object in imposing such restriction was, that the defendant should not, for twenty-four calendar months, take advantage of his being in the plaintiff's employment, and endeavour to appropriate his customers to himself. He would have frequent opportunities of becoming acquainted with his master's customers, and of securing them to himself; and it was a proper precaution for the master to take measures to prevent his servant from interfering with his trade. But

in order to effectuate this object, the master is not to restrain the servant for an unlimited space or time. In the present case, however, it does not seem to me that it is unreasonable that the defendant should be restricted, for twenty-four months, from commencing in the business of a milkman, within the distance of five miles from *Northampton Square*. That square appears to be the place where the plaintiff carried on his business; and we do not know but his customers extend throughout the district embraced by the restriction, and therefore cannot say that such a restriction is unreasonable.

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COLTMAN J. I am inclined to think that the plaintiff is entitled to judgment. With respect to the objection, that it does not appear that the consideration in respect of which the defendant entered into the agreement has been performed, the declaration contains a general allegation of performance of the agreement by the plaintiff; which is sufficient on general demurrer. (a)

The second objection is, that the breach is not well assigned. I agree that the breach must be alleged consistently with the meaning of the parties as expressed in the agreement. But it appears to me that two answers have been given to this objection, both of which are sufficient. I think the right of the plaintiff to maintain an action against the defendant for commencing business as a milkman within the limited space and time, vested on the determination of the contract, whatever may have been the way in which such contract was put an end to by the parties. In addition to that, the general allegation of performance is inconsistent with there being any violation of the contract on the part of the plaintiff. It is said, that it is not shewn that the contract was properly determined by the plaintiff; but, as already ob-

(a) *Vide Kemble v. Mills, antè, Vol. I. 757.*

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served, such general allegation of performance, although it would not be a sufficient answer on special, is so on general, demurrer.

With respect to the more important point in this case, I do not see that the contract itself is void, as being in restraint of trade. It is quite obvious that an injury might occur to the plaintiff by the defendant depriving him of a customer at the distance of five miles from *Northampton Square*, and that the latter might by degrees take away all his customers: *Horner v. Graves* proceeded on the ground that the court could plainly see that so wide a restraint as a hundred miles round *York* was wholly unnecessary for the protection of the plaintiff's business as a dentist. Here, it seems to me, that the limit imposed is one within which the defendant might interfere with the plaintiff's trade; and on this ground I concur in thinking that the plaintiff is entitled to judgment.

MAULE J. The plea has very properly been given up, and the question therefore is, whether the declaration is sufficient. It is said that the consideration for the agreement, on the part of the defendant, is not duly alleged to have been performed by the plaintiff. The consideration for the promise by the defendant is, the promise of the plaintiff to fulfil the agreement on his part. Now the plaintiff has, in general terms, stated that he has performed the agreement; which is sufficient on general demurrer. The declaration also alleges that the defendant entered the plaintiff's service as agreed on, and was retained and employed therein; so that there is both a general and a specific allegation of performance of the agreement by the plaintiff; which is quite sufficient. Then, with respect to the breach: the part of the agreement on which it is founded is, that the defendant "would not, during the conti-

nuance of such service, or within the space of twenty-four calendar months after quitting, or being discharged from, the same, commence," &c. Here, the parties carefully abstain from using the words "in manner aforesaid;" and although the plaintiff and the defendant might have respectively insisted on having a month's notice in writing of the intention of the other of them to determine the service, yet, if they put an end to it by mutual consent, it was clearly the meaning of the latter part of the agreement that the defendant should not, in that event, carry on the business of a milkman within the specified district. I think, therefore, that this objection cannot be sustained.

The chief objection is, that the declaration is bad on the face of it, inasmuch as it sets out an agreement which is in restraint of trade. There are undoubtedly many cases in which it is said that trade ought to be encouraged and not restrained; but, if this were *res integra*, I should say that it was questionable whether trade is promoted by setting aside restrictions like the present. Many think that trade would be benefited by allowing the public to carry it on in the way in which they have been accustomed to conduct it. Here, the plaintiff is not merely a milkman, but a cowkeeper, in which business much capital may be expended; and it has been thought that the more any trade is encouraged the more people will be induced to embark their capital in it. This is, however, a speculation, to which I should not have alluded if those who originally laid down the law had not commenced the discussion by stating the grounds on which *they* arrived at a different conclusion. Perhaps the best way would have been to hold all contracts of this nature to be legal, that do not interfere with the rights of individuals. The law, however, is established, that a contract in general restraint of trade is void; but it is also a part of the law, that a restriction,

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not to carry on a trade within a certain limit, if made for a good consideration, is valid.

It is said that, where the limit appears to be colourable, or where the restraint is clearly unreasonable, the case must be considered as falling within the general rule, and not within the exception. In *Horner v. Graves* this court saw clearly that the contract was colourable, and the limit imposed unreasonable; but the facts of that case were different from those on which we are called upon to decide here. It does not follow, that because the court considered there that a restraint of 100 miles was unreasonable, we should hold that, in this case, a restraint extending to a district of five miles, was larger than was necessary to prevent any interference on the part of the defendant with the plaintiff's business. I do not see that there is any thing unreasonable in this restriction; and if I were called upon to decide that point, I should say that, in all probability, it was reasonable; because the business of a milkman is very likely to extend beyond a circle of two miles and a half round his residence, and it might be interfered with by a person carrying on the same business at a distance of five miles from such residence. I think, therefore, that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

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CLOW and Another v. BROGDEN and Others.

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COVENANT. The declaration stated that before and at the time of making the indenture of demise after mentioned, the plaintiffs and one *Rebekah Bird*, since deceased, were possessed of the premises therein-after demised, for the residue of a term of ninety-four years wanting twenty days, commencing from the 24th day of *June* 1787; and being so possessed theretofore, to wit, on the 17th of *November* 1825, by indenture then made between the plaintiffs and the said *R. Bird* of the first part, *Benjamin Stacey* of the second part, *Robert Pawley* of the third part, and the defendants and *Richardson Borradaile*, since deceased, and *Lion Abraham Goldschmidt*, since deceased, of the fourth part, the

In covenant the declaration stated that the plaintiffs and *A. B.*, since deceased, being possessed of a certain house for the residue of a certain term of ninety-four years wanting twenty days, demised the same to the defendants

for twenty-one years, at a certain rent, by an indenture containing a covenant to repair, and alleged a breach of that covenant; by means whereof (a) all the estate and interest of the plaintiffs and *A. B.* in the house became and was forfeited, and the same reverted to *C. D.*, who thereupon availed himself of the forfeiture, and brought an ejectment, in which he recovered judgment, and obtained possession of the house; by means of which premises the plaintiffs since the death of *B.* had lost the rents covenanted to be paid by the defendants, &c.

The plea traversed the alleged breach of the covenant to repair; on which issue was joined.

At the trial the plaintiffs claimed damages for the loss of their term, and for the amount of dilapidations, in the house demised to the defendants. It appeared by the particulars delivered in the ejectment brought by *C. D.*, that such ejectment was founded upon the breach of certain covenants contained in a superior lease granted by *C. D.* for ninety-nine years, and that the breaches of covenant relied on were, the non-repair of various houses including the house in question (which was shewn to be out of repair), and for the breach of a covenant which was not contained in the lease to the defendants.

Held, first, inasmuch as it did not appear that *C. D.* might not have recovered possession of the property for a breach of the covenant not contained in the lease to the defendants, that the plaintiffs were not entitled to recover the value of their term from the defendants. (a)

Secondly, that they were entitled to recover the amount of the dilapidations in the house in question at the time that the ejectment was brought for the forfeiture.

(a) *Vide* note A, at the end of this volume.

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— the defendants and the said *Richardson Borradaile* and
CLOW *L. A. G.*, their executors, administrators, and assigns,
v. a messuage or tenement and premises, with the ap-
BROGDEN. purtenances, particularly mentioned and described in
the same indenture, for the term of 21 years from the
29th of *September* then last, at the yearly rent of 40*l.*,
payable quarterly, on the days therein mentioned. The
declaration then set out covenants by the lessees to
pay the rent and taxes, and to paint and repair; and,
after averring the entry and possession of the lessees,
alleged a breach of the covenant to repair; by means
whereof, afterwards, to wit, on the 2d of *June* 1836, all
the estate, right, title, and interest of the plaintiffs, and
the said *R. Bird*, of, in, and to the said demised pre-
mises, became and was forfeited, and the same thereby
reverted and came to, and was vested in (a), the Right
Honourable *John Somers*, Earl *Somers*, who thereupon
availed himself of the said forfeiture, and then brought
an action of ejectment in the court of Queen's Bench
against the tenants in possession of the said demised
premises, for recovery of the possession of the same;
and thereupon such proceedings were had, that after-
wards, to wit, on the 5th of *June* 1837, the said earl
recovered a judgment in the said action for his term
and interest therein, and then recovered and obtained
thereunder possession of the said demised premises; by
means of which several premises the plaintiffs, since the
death of the said *R. Bird*, have lost and been deprived
of the rents so covenanted by the defendants to be paid
to them as aforesaid, and also all the profits and advan-
tages which they might and otherwise would have
derived from the said premises, had their estate, right,
title, and interest continued therein. Damages 500*l.*

(a) *Vide* note A, at the end of this volume.

The plea traversed the breach of the covenant to repair as alleged; whereupon issue was joined.

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On the trial before *Coltman J.*, at the sittings in *Mid-
dlesx* after *Hilary* term, 1839, a verdict was found for the plaintiffs, damages as laid in the declaration, subject to the opinion of the court on the following special case.

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By indenture dated the 4th of *August* 1783, and made between one *Sir Charles Cocks*, therein described and since deceased, and the above named *Earl Somers*, by his then name and description of *John Somers Cocks*, eldest son and heir apparent of the said *Sir Charles Cocks*, of the one part, and *Jacob Leroux*, therein described, of the other part, the said *Sir C. Cocks* and the said earl did demise unto the said *J. L.* a piece of land therein described, (being the premises for the recovery of which the action of ejectment mentioned in the declaration in this cause was brought by the said *Earl Somers*,) to hold to the said *J. L.*, his executors, administrators, and assigns, for a term of ninety-nine years, from the 25th of *December* then next ensuing, at the yearly rent of 12*l.* payable quarterly.

This indenture contains a covenant by the said *J. L.*, for himself, executors, administrators, and assigns, that in case any erections or buildings should be erected and built by the said *J. L.*, his executors, administrators, and assigns, in or upon the said demised premises or any part thereof, during the said term thereby granted, then that he the said *J. L.*, his executors, administrators, and assigns, should and would well and sufficiently repair, uphold, support, sustain, maintain, amend, and keep the same premises and erections and buildings in good and sufficient repair and condition, when, where, and as often as need or occasion should be and require; and also another covenant, that it should and might be lawful to and for the said *Sir C. Cocks* and the said earl,

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or the person or persons entitled as aforesaid, his and their heirs or assigns, any or either of them, with workmen or others twice or oftener in every year during the said term thereby demised, to enter and come into and upon the said demised premises, and there to view, search, and see the state and condition thereof, and of the mounds, bounds, banks, and fences thereof; and of all defects and wants of reparation thereof, or any part thereof, then and there found, either in case of building or not, to give or leave notice, or warning, in writing to or for the said *J. L.*, his executors, administrators, or assigns, to repair and amend the same within the space of three months then next following such notice, within which space or time aforesaid he the said *J. L.* did thereby, for himself, his executors, administrators, or assigns covenant and agree to and with the said Sir *C. Cocks* and the said earl, or the person or persons entitled as aforesaid, his or their heirs or assigns, to repair and amend accordingly; and also another covenant that the said *J. L.*, his executors, administrators, or assigns, should not at any time thereafter during the said term thereby demised, either by himself or any other person or persons whatsoever, or by his or their means, consent, or procurement, annex unto, or unite any part of the said demised premises unto, any of the adjoining lands or grounds of any other person, so as to render the metes and bounds thereof uncertain and difficult, or permit or suffer encroachment or any other wrong to be done upon the said demised premises, to the prejudice or annoyance of the said Sir *C. Cocks* and the said earl, or the person or persons to be entitled as aforesaid, their heirs or assigns, without pursuing or seeking remedy and redress thereof, and first giving notice to the said Sir *C. Cocks* and the said earl, or the person or persons entitled as aforesaid, their heirs and assigns, some or one of them,

as often as any such prejudice, wrong, encroachment, or annoyance should be made or attempted; and in the said indenture is contained a proviso for re-entry in case of non-payment of the said rent, or breach or non-performance by the said *J. L.*, his executors, administrators, or assigns, of all or any or either of the covenants or agreements contained in the said lease.

In pursuance of the last-mentioned indenture, several houses, including the houses now known as No. 3. and 4. *South Row, St. Pancras*, in respect of the former of which the present action was brought, were built.

Joseph Bird, at the time of his decease after mentioned, had, by virtue of divers indentures of underlease and assignment and other means, become absolutely possessed of, or entitled to, the said houses, No. 3. and 4. *South Row*, for the residue of a term of ninety-four years, wanting twenty days, computed from the 24th of *June* 1787, being a derivative term out of the before mentioned term of ninety-nine years, subject as to the said house No. 3. *South Row* to an indenture of underlease, bearing date the 3d of *October* 1810, and made between one *John Bird* of the one part and *B. Stacey* of the other part, whereby the said *John Bird*, who was then entitled to the same house for the then residue of the said term of ninety-four years wanting twenty days, had demised the same to the said *B. S.*, his executors &c., for a term of twenty-one years, from the 25th of *March* 1809, at the yearly rent of 20*l.*; and to another indenture of underlease, bearing date the 16th of *November* 1818, and made between the said *B. S.* of the one part and *R. Lacey* of the other part, whereby the said *B. S.* had demised the same house to the said *R. L.*, his executors, &c., for a term of twelve years wanting ten days from the 25th of *March* 1818.

The said *Joseph Bird*, being so possessed of the said houses, No. 3. and 4. *South Row*, for the residue of the

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said term of ninety-four years wanting twenty days aforesaid, duly made and published his will, and thereby bequeathed unto his brothers-in-law, the said plaintiffs, among other things, all that his leasehold estate situate in the parish of *St. Pancras*, in the county of *Middlesex*, upon certain trusts, in the said will expressed, for the benefit of the testator's daughter *Elizabeth* and her children, and subject thereto, for the benefit of his wife the said *Rebekah Bird*, during her life, and after her decease, upon certain other trusts for the benefit of the said *Elizabeth* and her children; and the said testator thereby appointed his wife the said *Rebekah Bird* and the plaintiffs executrix and executors of his will.

The said *Joseph Bird* died on the 31st of *January* 1825, and his said will was duly proved by the said *Rebekah Bird* and the plaintiffs, in the prerogative court of *Canterbury*, on the 22d of *September* 1825. And afterwards the said *Elizabeth Bird* received the rents of the said leasehold estate in pursuance of the trusts of the said will.

By indenture, bearing date 17th of *November* 1825, made between the said *Rebekah Bird* and the plaintiffs of the first part, the said *B. Stacey* of the second part, *R. P.* of the third part, and the defendants and the said *R. Borradaile* and *L. A. G.* of the fourth part, being the indenture of that date mentioned in the declaration in this cause, after reciting the said indentures of the 3d of *October* 1810, and the 16th of *November* 1818, and also reciting that, by various mesne assignments, the said house, No. 3. *South Row*, had become legally vested in *R. P.* for all the residue of the said term of twelve years wanting ten days in the last-mentioned indenture mentioned; it is witnessed that, for the considerations therein mentioned, the said *R. P.* did assign, surrender, and yield up unto the said *B. Stacey* the said premises comprised and demised by the said indenture of the 16th of *November* 1818, with the appurtenances, to hold the

same unto the said *B. Stacey*, his executors, administrators, and assigns, to the intent that the said term of twelve years wanting ten days might be merged and extinguished. And by the indenture now in recital, for the considerations therein mentioned, the said *B. Stacey* did assign, surrender, and yield up the same premises with their appurtenances unto the said *R. Bird* and the plaintiffs, their executors, administrators, and assigns, to the intent that the said several terms of twelve years wanting ten days and twenty-one years might be merged and extinguished. And by the said indenture now in recital, for the considerations therein mentioned, the said *R. Bird* and the plaintiffs did demise and lease unto the defendants and the said *R. Borradaile* and *L. A. G.*, the said house, No. 3. *South Row* (with such exception and reservation as therein contained), with the appurtenances, to hold unto the defendants, and the said *R. Borradaile* and *L. A. G.*, their executors, administrators, and assigns for the term of twenty-one years, from the 29th of *September* then last, at the yearly rent of 40*l.*, payable quarterly as therein mentioned. And by the indenture now in recital, the defendants and the said *R. Borradaile* and *L. A. G.* did for themselves, their heirs, executors, and administrators, covenant with the said *R. Bird* and the plaintiffs, their executors, administrators, and assigns, among other covenants, that they the defendants and the said *R. Borradaile* and *L. A. G.*, their executors, administrators, and assigns, would, during the continuance of that demise, pay unto the said *R. Bird* and the plaintiffs, their executors, &c., the said yearly rent at the times and in the manner thereinbefore appointed for that purpose: and also should and would bear, pay, and discharge the land-tax, sewers-rates, and all taxes, rates, duties, assessments, and impositions whatsoever, imposed or charged, or to be imposed or charged upon, for or in respect of the said demised premises: and also should

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and would paint the outside wood and iron work thereof usually painted twice over in good oil colours once in every three years, and the inside wood and ironwork thereof usually painted twice over in good oil colours once in every seven years: and also should and would, when and as often as need should require, during the continuance of that demise, well and sufficiently repair, &c., and keep the said demised premises, and all walls, &c., and appurtenances thereto belonging, in, by, and with all, and in all manner of needful and necessary reparations, cleansings, and amendments whatsoever.

The said *Rebekah Bird* died on the 3d of *January* 1829. The said *Richardson Borradaile* died on &c.; and the said *Lion Abraham Goldschmidt* died on &c.

Prior to *June* 1836 between sixty and seventy houses, including the house and premises comprised in and demised by the last-mentioned indenture, had been erected, and were then standing, on the land demised by the said indenture of the 4th of *August* 1783. Many of these houses, including the house in question, were at that time considerably out of repair: and some of the land, houses, and premises comprised in the last-mentioned indenture, other than the house and premises demised by the said indenture of the 17th of *Nov.* 1825, had been annexed and united, by the tenants thereof, to adjoining property belonging to other persons, so as to make the boundaries thereof uncertain; and upon part of the said land and premises (other than the premises demised by the said indenture of the 17th of *November* 1825) encroachments had been permitted to be made, contrary to the covenants contained in the said indenture of the 4th of *August* 1783.

In *June* 1836 *Earl Somers*, the superior landlord, availed himself of the proviso for re-entry contained in the lease of the 4th of *August* 1783, and on the 5th of *June* 1837 obtained and signed judgment in an action

of ejectment which he had caused to be brought for the recovery of all the property comprised in that lease, including the house in question.

The particulars delivered under a judge's order, in the said action of ejectment, on the 3d of *May* 1837, stated that the action was founded on a breach of the covenants contained in the said indenture of lease of the 4th of *August* 1783; and that the breaches of covenant relied on, were:—first; the non-repair of various houses on the estate, referring in particular to the defective state of a great number of houses which were therein particularly mentioned and described, *including the house in question*;—secondly; the annexation of divers parts of the said premises to divers of the adjoining lands and grounds of other persons, so as to render the metes and bounds thereof uncertain and difficult to be ascertained; and also the permission of divers encroachments and other wrongs to be done upon the said demised premises to the prejudice of the said earl.

At the trial of this cause it was agreed, that, subject to the questions in the cause, the value of the residue of the term which the plaintiffs were alleged to have been deprived of by reason of the defendants' breach of covenant to repair, should be taken at 300*l.*, and the amount of dilapidations, up to the time of the ejectment being brought by Lord *Somers*, at 29*l.*

On behalf of the defendants the following objections were made: first; that the plaintiffs had lost no term which was vested in the plaintiffs and *Rebekah Bird*, the term in question having, by virtue of *J. Bird's* will, become vested in the plaintiffs alone, and not in the plaintiffs and *Rebekah Bird*; secondly, that the term in question, in whomsoever vested, having determined by the judgment in ejectment (a), the plaintiffs could not

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recover more than nominal damages; thirdly, that with respect to the claim of 300*l.* for the loss of the term, the plaintiffs were not entitled to any damages on that ground, the ejectment having been brought for other breaches of covenant besides that for the non-repair, and regarding other premises distinct from the premises in respect of which this action was brought.

Either party is to be at liberty to turn the case and facts into a special verdict.

The court is to be at liberty to draw any inference from the facts stated, which a jury might be directed to draw from the same facts; and to be at liberty, upon the plaintiffs' application, to make any amendment which a judge at nisi prius might have made.

If the court shall think that all the above objections, or the first and second, or the second and third, are well founded, then, subject to any amendment which may be made under the power reserved, the damages are to be reduced to 1*s.*

If the court shall think that the second of the above objections is not maintainable, and that the other two are maintainable, or either of them is, then (subject as last aforesaid) the damages are to be reduced to 29*l.*

If the court shall be of opinion that the first and third of the above objections are not maintainable, but that the second is maintainable, then (subject as before) the damages are to be reduced to 300*l.*

If the court shall be of opinion, that none of the objections are well founded, the damages are to be reduced to 329*l.*

Plaintiffs' points. — The plaintiffs will contend, that the verdict in this cause ought to stand for 329*l.*, on the following, amongst other, grounds; namely, that inasmuch as the plaintiffs and *Rebekah Bird* were executors and executrix of the will of *Joseph Bird*, the residue of the term in question vested in them as such,

and that the first objection made by the defendants to the plaintiffs' right to recover, and set forth in the special case, is therefore unfounded.

That the said first objection, even supposing it to be valid, may be obviated by amendment, pursuant to the power reserved in the special case.

That as to the second objection of the defendants, set forth in the special case, the defendants' liability to make good the amount of the dilapidations in question, was not divested by the circumstance that those dilapidations occasioned to the plaintiffs the further damage of losing their term by the judgment in ejectment in this case mentioned.

That as to the third objection of the defendants, set forth in this case, the fact, that the ejectment in the declaration mentioned, was brought for other breaches of covenant, besides that for the non-repair, and as regards other premises, distinct from the premises in respect of which this action is brought, does not affect the plaintiffs' right to recover damages for the loss of their term.

That any objection to the declaration on the ground that it was necessary to set forth any other causes for which the said ejectment was brought, may be obviated by an amendment, pursuant to the power reserved in this special case.

Defendants' points. — The defendants will contend, that the damages ought to be reduced to 1s. on the following, among other, grounds, viz. :

That the residue of the term in question did not vest in the plaintiffs and *Rebekah Bird*.

That the term in question, having determined by the judgment in ejectment, the defendants are not liable in respect of the dilapidations in question.

That the ejectment having been brought for other breaches of covenant besides that for non-repair, and as regards other premises, distinct from the premises in

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respect of which this action was brought, the defendants are not liable for damages for the loss of the term in question.

Channell Serjt., for the plaintiffs. This case will be simplified by considering only three terms, namely; first, the term for ninety-nine years granted in 1783, the reversion in fee being in the *Somers* family; secondly, that for ninety-four years wanting twenty days, the residue of which was vested in the plaintiffs and *Rebekah Bird* at the time that the lease of twenty-one years was granted to the defendants, and two others whom they have survived; and, thirdly, the last mentioned lease. Under that lease the defendants were entitled to the possession of the premises for twenty-one years, paying the rent, and performing the covenants therein reserved and contained. The plaintiffs, on the other hand, were entitled to the rent, and to the reversion expectant on the determination of the lease. This is therefore an ordinary case between landlord and tenant. The plaintiffs complain that, by reason of the breach of covenant by the defendants, Lord *Somers*, the reversioner in fee, became entitled to sue for a forfeiture, and that he brought an ejectment, under which he recovered judgment, and thereby (a) destroyed their interest in these premises. It is not disputed that Lord *Somers* recovered possession of the property; but it appears, on reference to the particulars delivered in the ejectment, that Lord *Somers* brought his action for all the premises comprised in the original lease, and for breach of other covenants, besides the covenant to repair. It seems also that there were dilapidations in other houses distinct from those in question, and that a breach of one of the covenants, namely, not to alter the boundaries of the property, was not brought home to the defendants.

(a) *Vide* note A, at the end of this volume.

The first objection made by the defendants is, that the plaintiffs have lost no term which was vested in them and *Rebekah Bird*, the term in question having, by virtue of *Joseph Bird's* will, vested in the plaintiffs alone. It will be said that very slight circumstances will induce the court to assume that the plaintiffs, as executors, and *Rebekah Bird* as executrix, assented to the bequest to the plaintiffs as trustees for the testator's daughter; and that the fact stated in the case, namely, that the daughter received the rents, is equivalent to a receipt of the rents by the plaintiffs themselves. The question is whether, upon the pleadings, this objection is open to the defendants. [*Tindal* C. J. The breach is, that the defendants did not repair, by reason whereof all the estate and interest of the plaintiffs and *Rebekah Bird* in the demised premises became forfeited.] It will be said that, beyond the breach, the plaintiffs have alleged special damage, which they must prove; that they have stated the term forfeited to be the plaintiffs and *R. Bird's*, whereas it belonged to the plaintiffs. If the objection may be taken, the court will be asked to amend under the power given to them by the special case. [*Tindal* C. J. The objection arises on the *per quod*; it is not a part on which a traverse can be taken; the question is, whether it may not be rejected. *Maule* J. It is not stated that the dilapidations were in *Rebekah Bird's* lifetime. *Tindal* C. J. There is no traverse of the allegations in the declaration, the only traverse being of the breach of the covenant to repair. If there had been a traverse, that the plaintiffs and *R. Bird* were possessed of the term, then the objection would have been available. Is this an objection that could have been made at nisi prius, when the jury were only sworn to try the question of repairs?] It is submitted that this objection is not open to the defendants; but if so, that the court may amend or otherwise reject the part as surplusage.

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The second objection is, that inasmuch as the term, in whomsoever vested, has been determined, the plaintiffs can only recover nominal damages. It is difficult to see how that circumstance can interfere with the right of the plaintiffs to recover the amount of the dilapidations. There may be some pretence for saying that the plaintiffs ought not to recover the 300*l.*, the value of the term, inasmuch as the forfeiture was incurred, as well by the breach by other parties of other covenants, as by the breach of the covenant to repair committed by the defendants; but there seems no reason at all, when the acts of the defendants have at least been assisting in producing the forfeiture, that the plaintiffs should be prevented from recovering for the dilapidations. [*Maule J.* Is it stated that the defendants had notice of the lease from Lord *Somers*, and of the covenants it contained?] No; but the covenants to repair in that lease and in the underlease to the defendants, are substantially the same. [*Tindal C. J.* There is this difficulty in the way of the plaintiffs. In the particulars delivered in the ejectment brought by Lord *Somers*, it appears that the action was brought for a forfeiture caused by a breach of a covenant which is not contained in the lease to the defendants. How are we to know that Lord *Somers* did not recover in respect of that breach alone?] A surveyor was called, who proved the dilapidations in the house held by the defendants. [*Tindal C. J.* But he would also prove that the boundaries of other houses had been altered. How can we tell on which breach of covenant the jury founded their verdict? It certainly does seem a harsh measure, that a party is to be held liable without knowing whether his landlord is seised in fee or only holds the property under a term containing covenants of which he knows nothing. I do not, however, say that he is not liable.] Here, the defendants knew that the plaintiffs were themselves only lessees. [*Tin-*

dal C. J. But they might have a reversion of only a day beyond the extent of the underlease. *Bosanquet* J. You must say, that where there is other property included in the original lease, the tenant is answerable for the value of the whole of the property which is forfeited by his act.]

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TINDAL C. J. We will give no opinion on this part of the case, for the difficulty is thrown on the plaintiffs of shewing that the forfeiture was caused by the acts of the defendants. This the plaintiffs are unable to do, which affords the court ground enough for saying that they are not entitled to recover from the defendants the sum they claim in respect of the loss of their term.

Allan (*Wilde*, Solicitor-General, was with him,) for the defendants. With respect to the claim for dilapidations, the plaintiffs are only entitled to nominal damages; for while the lease was in existence the plaintiffs were not prejudiced by the house being out of repair, since it might have been completely restored before the expiration of the term. (a) [*Tindal* C. J. According to that argument, damages for dilapidations never could be recovered. If there is an existing term, it is very difficult to say that a landlord is not prejudiced by a house being out of repair. If he wanted to sell it he could not get so good a price for it.] That might be ground for special damage. [*Coltman* J. You say here that the term having expired, the plaintiffs have sustained no damage.] In *Vivian v. Champion* (b), the plaintiff, as heir, declared that his ancestor, by indenture, demised to a party who assigned to the defendant, and who covenanted to repair, and to leave in repair, and, for breach, assigned that on a certain

(a) *Sed vide Luxmore v. Robson*, 1 B. & Ald. 585.

(b) 1 Salk. 141. S. C. 2 Lord Raym. 1125.

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day, and for ten years before, the premises were out of repair. After verdict for the plaintiff, it was moved, in arrest of judgment, that part of the ten years occurred in the life of the ancestor. But *Holt* C. J. said, "If the premises were out of repair in the time of the ancestor, and continued so in the time of the heir, it is a damage to the heir, and the jury gives as much in damages as will put the premises in repair; but here no damages are given in respect of the length of time they continued in decay, but in respect of what it will cost, at the time of the action brought, to put the premises in repair, therefore *per decem annos* was frivolous; and he said that this was not a hard action; and good damages are always given in these cases, because the damages recovered ought to be applied to the repair of the premises. [*Tindal* C. J. That case is frequently cited to shew that a covenant to repair is a continuing covenant. Was not the lease there still subsisting? *Maule* J. It must have been so; for Lord *Holt* says, that it was not a hard action; as the damages ought to be applied in repairing the premises, evidently meaning that the lessee would get the benefit of the repairs.]

TINDAL C. J. I see no reason why the plaintiffs should not recover in this action the sum of 29 $\frac{1}{2}$ l., the amount agreed upon as the damages for the dilapidations caused by the breach of the covenant to repair entered into by the defendants. The answer set up is, that the plaintiffs have sustained no actual damage, because (partly, at least, by the default of the defendants,) the term in the premises has been determined. I think that it does not lie in the mouths of the defendants to make such an objection. But, independently of that, I am not convinced that the objection is reasonable; for the plaintiffs may be answerable over to the superior landlord, for the amount of these damages; and I see no

ground why they should not recover them from the defendants.

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The rest of the court concurred.

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Judgment for the plaintiff for the sum of 29*l.*, the amount of damages agreed upon for the dilapidations. (a)

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(a) See note A, at the end of this volume.

TAYLER, Administrator of the Estate and Effects of **D. F. TAYLER**, deceased, Plaintiff;
v. **MARLING** and Others, (Assignees of **HENRY SHUTTLEWORTH**, a Bankrupt,) Defendants.

THE following case was stated for the opinion of the court under the provisions of 3 & 4 *W. 4. c. 42. s. 25.*

Previously to *December 1838*, *Shuttleworth* carried on business as a patent-pin manufacturer, in co-partnership with *D. F. Tayler*. On the 18th of that month he entered into an agreement with the said *D. F. Tayler*, for the purchase of his interest in the concern, as follows:—

Memorandum of an agreement made and entered into this 18th day of *December 1838*, between the undersigned *D. F. Tayler* of the one part and the undersigned *H. Shuttleworth* of the other part, whereby it is agreed and covenanted as follows, that is to say:

That the said *D. F. Tayler*, in consideration of the sum of 3500*l.*, and of an annuity of 300*l.*, to be paid

the sum in the hands of *C.*, becomes bankrupt. The submission is not revoked; nor are the assignees of *B.* entitled to demand back the money.

Under such circumstances *C.* has not a mere authority, but an authority coupled with an interest.

Upon the reference of a cause, and after matters in difference, though the arbitrator finds no damages, and orders no damages to be entered, the costs may be taxed upon the award.

In a submission to arbitration by an order of nisi prius, in an action between *A.* and *B.*, it is stipulated that a certain sum of money shall be placed by *B.* in the hands of *C.*, the arbitrator, to abide the event of the award. *B.*, after placing

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and secured in manner hereinafter mentioned, is to assign and absolutely transfer, free from incumbrances, on the 1st day of *January* next, unto the said *H. Shuttleworth*, all his right, title, benefit, property, and interest of and in the pin-patent machinery, utensils, and implements of trade, stock, book debts, securities, fixtures, and all other matters and things relating thereto, together with the said business; and also the lease of *Light Pool Mills*, and all benefit thereof, for the remainder of the term; and also the lease of the house, warehouses, and hereditaments in *King Street, Cheapside, London*, together with the stock, furniture, and fixtures, and every other matter and thing in and about the same premises; and also the lease of the *Priory*, in *Woodchester*, in the county of *Gloucester*, and the coach-house, stables, outbuildings, gardens, orchards, closes, and hereditaments thereto adjoining; and also the lease, of an agreement for a lease, of a certain cottage, coach-house, lands, closes, gardens, fishpond, and other hereditaments, near to the said *Priory*, and recently taken by the said *D. F. Tayler*, of *Thomas Lediard*; together with all the fixtures, furniture, household goods, plate, linen, china, trees, shrubs, and every property, matter, and thing belonging or appertaining thereto, or being in or about the same, and every part thereof; with all the privileges and advantages thereto except the furniture and articles in the *Priory*, and particularised in the list signed by the said *D. F. Tayler* and *H. Shuttleworth*, and which are the property of the said *D. F. Tayler*.

That the said *H. Shuttleworth* is to give a warrant for securing to the said *D. F. Tayler* the said sum of 3500*l.* on the said 1st of *January* next, and which is to be paid as follows: viz. 1500*l.*, part thereof, on the 25th of *February* next; 1000*l.*, other part thereof, on the 25th of *March* next; and the remaining 1000*l.* on the 1st of

July next, with interest at 4 per cent. on the respective sums from the 1st of *January* next; but it is expressly agreed and understood that the said warrant of attorney is not to be filed or docketed, nor is judgment to be entered up thereon, nor is any other proceeding to be taken thereon, or execution to be issued, until the said 1st of *July* next, and then only in case of default in payment of any of the instalments before mentioned; and the said annuity of 300*l.* is to be paid quarterly during the life of the said *D. F. Tayler*, upon the usual feast days, and the first payment to commence on the 25th of *March* next, and to be paid to the account of the said *D. F. Tayler* with the Bank of *England*; and the said annuity to be secured upon property of ample value to the satisfaction of the solicitor of the said *D. F. Tayler*. That the said *H. Shuttleworth* is to pay all debts due to *Joseph Wartnaby*, senior, upon his own account, or as executor or administrator of his late son *Joseph Wartnaby*, and especially the sum of 1400*l.*, or upwards, claimed by the said *Joseph Wartnaby*, and all expenses attending the same; and also all the debts and liabilities of whatever description now owing by the firm or partnership of *D. F. Tayler* and Company; and save harmless the said *D. F. Tayler* from the same, and any expenses attending the same.

That the said *H. Shuttleworth* is to pay all rents, taxes, rates, and outgoings now due or to become due in respect of the premises before mentioned, and to fulfil all covenants to be performed by the tenant. That the said *D. F. Tayler* is not to carry on any trade or business as a pin or needle manufacturer, or in the wire business, or in any business connected therewith (except for the benefit of the said *H. Shuttleworth*); and he is to allow the name of *Tayler* to be used in carrying on the business, now conducted in the name or style of *D. F. Tayler* and Company, for so long a time as it may

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be deemed expedient by the said *H. Shuttleworth*, and to use his best exertions to promote the same business. And the dissolution of the partnership is not to be inserted in the *Gazette* or elsewhere until the 1st of *March* next. That the expenses of this agreement and the notice of dissolution is to be borne equally by the said *D. F. Tayler* and *H. Shuttleworth*, and the expense of the securities and assignment by the said *H. Shuttleworth* wholly.

Witness,

E. Tayler.

D. F. Tayler.

H. Shuttleworth.

In *May* 1839, an action of assumpsit was commenced by *D. F. Tayler* against *H. Shuttleworth* for a breach of the said agreement. The pleadings in the cause are to be considered as part of this case, and may, if necessary, be referred to by either parties to the present suit.

The cause came on for trial at the Summer assizes for the county of *Gloucester* 1839, when, by an order of nisi prius, it was ordered by the court, and with the consent of the parties, *their counsel and attorneys* (a), that the jury should find a verdict for the plaintiff, damages 10,000*l.*, costs 40*s.*, subject to the award or awards thereafter mentioned; and that it should be referred to the order, abitrament, final end, and determination of *W. F.*, Gent., to settle the cause and all matters in difference between the said parties in the said order mentioned. And it was also ordered that *H. Shuttleworth* should pay to the said arbitrator, on or before the 10th day of *October* then next, the sum of 3500*l.* on account, to be paid out by the arbitrator to such of the said parties in the said order mentioned as he might think fit. The arbitrator was to make one or more

(a) i. e. with the consent of the parties, *by* their counsel and attorneys; but the words "their counsel and attorneys," appear to be wholly unnecessary, if not improper.

award or awards, as he might think fit. If the money was not paid as aforesaid to the arbitrator, judgment was to be signed for the damages in the declaration, and execution was to issue for 2637*l.*, and costs, and interest thereon from the 6th of *August* then instant, together with the costs of the reference, and of any award or awards which the arbitrator might then have made; and the arbitrator was to order and determine what should be done by the parties respecting the matters in dispute, who agreed to be bound and concluded by such determination, and to remain contented and satisfied therewith, so as the arbitrator made and published his award or awards in writing concerning the premises, on or before the 4th day of *Michaelmas* term then next. And it was ordered that the arbitrator should be at liberty to enlarge the time for making the same; and that the costs of the cause should abide the event of the said award or awards, to be taxed by the proper officer; and that the costs of the reference should be in the discretion of the arbitrator, who was to direct by whom and in what manner the same should be paid.

This order is to be considered as part of this case, and may, if necessary, be referred to by either of the parties to the present suit.

A verdict was entered for the plaintiff damages 10,000*l.* accordingly.

On the 10th *October* 1839, in pursuance of the said order, *H. Shuttleworth* paid to the arbitrator the said sum of 3500*l.*

On the 14th *December* 1839, *H. Shuttleworth* committed an act of bankruptcy, by neglecting to put in bail within twenty-one days after notice that an affidavit of debt had been filed against him in the court of bankruptcy; and, on the same day, a docket was struck against him. On the same day notice was given to the said arbitrator and

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D. F. Tayler of the act of bankruptcy, and of the striking of the said docket.

The arbitrator enlarged the time for making his award until the fourth day of *Hilary* term, 1840.

18 *December*, 1839. The arbitrator made his award in writing, and on the next day notice of the making of the award was served on the attorneys of the said *H. Shuttleworth*; which award is as follows:

Whereas (the award here recited the submission, and proceeded thus): and whereas I, the said arbitrator, took upon myself the burthen of the said reference, and the defendant duly paid into my hands the said sum of 3500*l.*, according to the terms of the said order; and whereas I have duly enlarged the time for making my award or awards until the fourth day of next *Hilary* term; and whereas I the said arbitrator, having heard, examined, and duly weighed and considered the allegations, statements, vouchers, deeds, papers, writings, books, proofs, and witnesses produced before me by the said parties respectively, do make and publish this my award of and concerning the said cause, matters, and premises so referred to me as aforesaid as follows:—I do order, award, and adjudge that the plaintiff is entitled to recover, and to have a verdict entered for him, on the several issues joined in the said cause. And I do find, order, adjudge, and determine that the plaintiff hath sustained damages by reason of the premises in the said cause mentioned, and also of the several other matters in difference and dispute between the said parties also referred to and submitted to me to the amount of 6067*l.* And I do think fit, and further order, and determine, that the said sum of 3500*l.* so deposited with me as aforesaid, shall be paid to the said plaintiff on account of the said damages so found due to him as aforesaid. And I do further award, order, and determine that the defendant shall

pay to the plaintiff on the 21st day of *January* next, between the hours of one and two o'clock in the afternoon at the hall of the Law Institution, in *Chancery Lane, London*, the sum of 2567*l.*, being the balance of such damages so found due to him as aforesaid. And I do further award, order, and direct that the defendant shall pay to the plaintiff, all the plaintiff's costs of and incidental to the said reference, to be taxed by the proper officer; and also the costs and charges of me the said arbitrator, and of this my award; and I do also award and determine that the defendant do bear and pay all his own costs of, and occasioned by, the said reference and award. And I do further award, order, and direct that upon payment of the damages, costs, and charges to the plaintiff, he the plaintiff do forthwith, and when thereunto required at the costs of the defendant, execute and make unto the defendant a good and sufficient assignment, conveyance, and transfer, free from incumbrances, of all his the plaintiff's right, title, benefit, property, and interest of and in the pin-patent machinery, utensils, and implements of trade, stock, books, debts, securities, fixtures, and all other matters, and things relating thereto, together with the said business of pin and machine manufactures; and also of and in the lease of *Lightpool Mills*, and all the benefit thereof for the remainder of the term; and also of and in the house, warehouses, and hereditaments in *King Street, Cheapside, London*; together with the stock, furniture, and fixtures, and every other matter and thing in and about the same premises, and also of and in the lease the *Priory* in *Woodchester*, in the county of *Gloucester*, and the coach-houses, stables, outbuildings, gardens, orchards, closes, and hereditaments thereto adjoining; and also of and in the lease or an agreement for a lease of a certain cottage &c., near to the said *Priory*, and recently taken by the plaintiff of *Thomas*

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Lediard, together with all the fixtures, furniture, household goods, plate, linen, china, trees, shrubs, and every property, matter or thing belonging or appertaining thereto, or being in and about the same, and every part thereof, with all the privileges and advantages thereto, according to the terms of the agreement made between the said parties on the 18th day of *December*, 1838. And upon payment of all such damages, sum and sums of money, and of all and singular the costs, charges, and expenses as aforesaid; I do further award, determine, and direct, that the said plaintiff shall on request, and at the expense, costs, and charges of the defendant, make and execute a good and perfect release to the defendant of and from an annuity of 300*l.*, agreed to be secured by the defendant to the plaintiff for his life by the said agreement, but which has not been done, and also all arrears of the said annuity, and all claims and demands in respect thereof, so as perfectly and effectually to extinguish and put an end to the same, and all arrears thereof; and also a full and effectual release of and from all other claims and demands whatsoever up to the date of the said order of reference. And I do further award, determine, and direct that the private ledger of and regarding the partnership affairs of the said parties, produced before me and now in my possession, is the property of, and shall be delivered and belong to, the defendant on his delivering over a copy of such ledger now in his possession to the plaintiff in exchange for such original ledger. And I do also award and determine that the plans or drawings of certain machinery made by the plaintiff produced before me, and now in my possession, are and of right belong to him, the plaintiff as his own property, and shall be delivered to, and held by him accordingly. And I further award and determine that upon the several subject matters in difference referred

and submitted to me, the defendant hath not any legal or equitable claim or demand whatsoever upon or against the plaintiff, nor hath the plaintiff any other legal or equitable claim upon or against the defendant, save as appears by this my award. And, lastly, I do award and direct that the defendant shall, when thereunto requested by, and at the costs and charges of the plaintiff, make and execute to him a full and effectual release of all claims and demands whatsoever up to the date of the said order of reference.

On the 19th *December* 1839 the fiat, which had been bespoken the day before, was issued.

Under this fiat the said *Henry Shuttleworth* was adjudged a bankrupt upon the before-mentioned act of bankruptcy, and the defendants have been duly chosen assignees under it.

On the 13th *January* 1840 the order of nisi prius was made a rule of court.

No judgment has been signed, nor have the costs in the action so referred been taxed.

On the 2d *February* 1840 the said *D. F. Tayler* died intestate.

Letters of administration have been since duly granted to the plaintiff *E. Tayler*.

On the 6th *March* 1840 an action was commenced by the plaintiff *E. Tayler* against the arbitrator, to recover the said sum of 3500*l.*

The said sum of 3500*l.* being also claimed by the defendants, as assignees of *Henry Shuttleworth*, the arbitrator applied to *Tindal C. J.*, under the interpleader act (*a*), who, upon hearing the attorneys or agents on both sides, did order that the arbitrator and stakeholder, after deducting the costs to which he had been put, to be taxed by the master, should pay the

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(a) 1 & 2 W. 4. c. 58.

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residue into court, and thereupon be discharged; such costs to be ultimately paid by the unsuccessful party; and he did further order, that an issue should be tried as to the property in the money; in which issue the plaintiff in the action was to be plaintiff, and the assignees defendants, unless the parties agreed to state the facts in a special case. All questions as to costs to be reserved. The money, after being paid into court, to be invested in exchequer bills by the consent of the parties. The residue of the said sum of 3500*l.*, after deducting the costs of the said action, has been paid into court and invested in pursuance of the said order.

There being no facts in dispute, the plaintiff, *E. Tayler*, and the defendants, the assignees, have stated this case accordingly; and they agree that a judgment shall be entered for the plaintiff or defendants immediately after the decision of the court; and the money invested paid as the court may think proper.

The questions for the opinion of the court are,

First, whether under the circumstances above stated, the plaintiff, as administrator, is entitled to the said sum of money so awarded to the said *D. F. Tayler* as aforesaid.

Secondly, whether the defendants, as assignees of *H. Shuttleworth*, are entitled to the said sum under and by virtue of the said fiat in bankruptcy so issued against *H. Shuttleworth*.

Channell Serjt. (with whom was *W. J. Alexander*) for the plaintiff. Upon the deposit of the 3500*l.*, *Fisher* became a stakeholder as well as arbitrator. That sum was received, not to the use of the person by whom it was placed in the hands of the arbitrator, but to the use of the party who, by the result of the award, should be declared to be the party entitled to it. The depositing of money with an arbitrator for the purpose of being

dealt with as the award shall direct, is analogous to the payment of money into court by the defendant in an action, which, being a payment by compulsion of law, cannot be recovered back by the assignees, upon the bankruptcy of the defendant; *Reynolds v. Wedd.* (a) There, the money was paid into court after the act of bankruptcy. Here, before any act of bankruptcy is committed. In *Belcher v. Mills* (b), which may, perhaps, be relied on for the defendant, the attorney, who held the money, was not a stakeholder, and had contracted no obligation to pay. In *Ferrall v. Alexander* (c), the plaintiff was not interested in the fund at the time of the bankruptcy.

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Manning Serjt. (with whom was *Whateley*), *contra*. The defendants are entitled to judgment on three grounds:

First, the original contract was, to abstain from carrying on a particular trade without limitation in point of time or place. Upon the view which the courts have taken of public policy, this is a contract in illegal restraint of trade, and is therefore void. The different considerations upon which the defendant's promise is founded are so connected, that if one proves bad, the promise must fail altogether. The original cause of action failing, the order of reference made in the cause is void, and the arbitrator acts without authority, and his award is a nullity. [*Tindal* C. J. *Shuttleworth* would have had no right to complain of a condition by which he alone is benefited. The order of court contains a submission of all matters in difference between the parties. The arbitrator may have founded his award upon a distinct ground, which may be perfectly legal. The argument put forward is, in truth, in arrest of

(a) 4 *New Cases*, 694.; 6 *Scott*, 699.; 6 *Dowl. P. C.* 728. (b) 5 *Tyrwh.* 715.; 2 *Cro. M. & R.* 150. (c) 1 *Dowl. P. C.* 132.

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judgment in the original action; but it is now too late to move either in arrest of judgment, or to set aside the award. *Bosanquet J.* Any objection to the original contract should have been pleaded.]

Secondly, the arbitrator and the parties had notice of the act of bankruptcy before the award was made. In *Tayler v. Shuttleworth (a)* the fact of notice did not appear. That deficiency is now supplied. By 2 & 3 *Vict. c. 29.*, “contracts, dealings, and transactions by and with any bankrupt, really and *bonâ fide* made and entered into before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy, provided the person dealing with the bankrupt had not, at the time of such contract, dealing, or transaction, notice of an act of bankruptcy.” Here, the person dealing with the bankrupt had such notice. This case is, therefore, not within the protection of that statute, even supposing awards to fall within the description of “transactions with the bankrupt.”

Before the passing of that statute it was a question whether a submission to arbitration was revoked by bankruptcy. In *Marsh v. Wood*, Lord *Tenterden* said, that it was not necessary in that case to decide whether bankruptcy in general revokes the submission. [*Tindal C. J.* There the fiat was before the making of the award.] The case not being within 2 & 3 *Vict. c. 29.* the period of the fiat is not material. This being a revocation, not by the act of a party to the reference, but by operation of law, is not affected by 3 & 4 *W. 4. c. 42. s. 39.*, which takes away the power of revoking a submission to arbitration. [*Maule J.* In *Marsh v. Wood (b)*, if the party, instead of committing an act of bankruptcy, had sold the ships, the purchaser would have had a good title against the assignees; because the

(a) 6 *New Cases*, 277.; 8 *Scott*, 565.

(b) 9 *B. & C.* 659.; 4 *Mann. & Ryk.* 504.

ships were not, as this 3,500*l.* was, in the hands of the arbitrator. Here, the money is in the hands of the arbitrator as a stakeholder; and an authority coupled with an interest is not revocable. The bankrupt could not, by selling his interest in the 3,500*l.*, have divested the money out of the arbitrator.] There was at least a contingent debt to the bankrupt. [*Tindal* C. J. By disposing of the money in the hands of the arbitrator, the bankrupt might be selling the inchoate rights of third parties. In the case of a wager upon a race, can the bankruptcy of one of the parties give to his assignees a right to recover from a stakeholder a sum deposited with him to abide the event?] Unless a submission be binding on both parties, it binds neither; *Ferrer v. Owen*. (a) In the case of bankruptcy arising after submission, the whole of the bankrupt's property is taken from him and vested in his assignees. The assignees and the creditors of the bankrupt are clearly not bound by the submission. The bankruptcy, therefore, creates such a total change in the position of the parties, that the submission becomes void. A submission after a secret act of bankruptcy is void; *Andrews v. Palmer* (b), *Dodd v. Herring* (c); and it is submitted that bankruptcy occurring before the award, puts an end to the submission on the part of the bankrupt, the liability of whose person and estate formed the consideration for entering into the submission on the part of the plaintiff. If the submission become void as to either party, it is void as to both; *Dilley v. Polhill* (d), *Ferrer v. Owen*.

Thirdly, the award directs, that upon payment of the damages, costs, and charges to the plaintiff, certain property shall be conveyed by him to *Shuttleworth*. The payment of the damages and costs is made a condition

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(a) 7 B. & C. 427.; 1 Mann.
& Ry. 222.

(b) 4 B. & Ald. 250.

(c) 1 Russel & Mylne, 153.

(d) 2 Stra. 923.

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precedent to the right to demand a conveyance. The arbitrator not having assessed any damages, no costs can be taxed in the cause. [*Tindal* C. J. Upon a breach of contract the plaintiff is entitled to nominal damages. If you pay all the costs which *can* be taxed, it is sufficient. It is ungracious on your part to complain that you have not more costs to pay.] The defendants do not complain that they are not required to pay the costs of the action. Their difficulty is, that the omission to award the costs of the action, deprives them of their remedy for obtaining the conveyance of property which, it is evident, the arbitrator considered they ought to have. Nominal damages entitle a plaintiff, under the statute of *Gloucester*, to costs just as much as substantial damages; but when there is no assessment of damages at all, no costs can be awarded; and the plaintiff, by the terms of the award, is not bound to convey until the costs are taxed. The award is void for uncertainty. *Seccombe v. Babb.* (a)

Channell Serjt. in reply, was directed to confine himself to the last point. When the case was before the court on a former occasion the same objection was in substance taken; and it was attempted to be supported by the case of *Marten v. Burge*, which, however, the court distinguished from the case before them. The arbitrator is not to enter a verdict, but he is to settle the cause. The costs will be taxed upon the rule of court.

The arbitrator was also a stakeholder. He held the money deposited with him under an authority coupled with an interest. His authority was therefore not revocable. [*Maule* J. If the act of bankruptcy operates as a revocation of the authority, it is a revocation by the act of the bankrupt.] But even in an ordinary case of sub-

(a) 6 M. & W. 129.

mission to arbitration, it is settled that the bankruptcy of one of the parties is no revocation of the submission; *Andrews v. Palmer* (a), *Haswell v. Thorogood*. (b)

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TINDAL C. J. It seems to me that, without reference to the two cases which have been last cited, the arbitrator in the present case stood in such a peculiar situation, that the bankruptcy of one of the parties could not operate as a revocation of his authority. *Fisher* was not simply an arbitrator; he was a depositary and stakeholder. Instead of being benefited, *Tayler* would have been placed in a worse situation by the depositing of the 3,500*l.*, if the authority of *Fisher* had been revoked by the bankruptcy. I think that, with respect to this sum, *Fisher* had not merely authority to decide the dispute between the parties to the submission, but that he had an authority coupled with an interest. (c)

BOSANQUET J. I am of the same opinion. The 3500*l.* was paid to *Fisher* as a stakeholder; and, as arbitrator and stakeholder, he had an authority coupled with an interest. Besides which, *Andrews v. Palmer* seems to me to be an authority for holding that bankruptcy is no revocation of a submission by order of nisi prius.

COLTMAN J. No interest would pass to the assignees beyond the interest which *Shuttleworth* had at the time of the bankruptcy. *Shuttleworth's* interest was — the possibility of becoming entitled to the sum by an award made in his favour. Until the making of an award the 3500*l.* was to remain in the hands of *Fisher*, who was bound to proceed to determine to which party the fund

(a) 4 B. & Ald. 250.

(b) 7 B. & C. 705.

(c) And see *Bromley v. Holland*, 7 Ves. 3. 28.

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belonged. It is not necessary to decide whether bankruptcy is or is not, under ordinary circumstances, a revocation of a submission to arbitration. I find no authority which says that it shall have that effect; and there are some cases in which the contrary seems to have been held. Upon that point, however, I express no opinion, it being sufficient for the decision of the present case that the 3500*l.* having been deposited with *Fisher* for a specific purpose, the assignees would not be entitled to receive it until the arbitrator had decided in favour of the bankrupt's claim.

MAULE J. I am of opinion that there has been here no revocation. As soon as the 3500*l.* was received by *Fisher*, it ceased to be the money of the bankrupt. (a) It may be considered as a deposit made by both parties; for though the plaintiff did not absolutely place money in the hands of *Fisher*, he gave a valuable consideration for the 3,500*l.* being so deposited in relinquishing his right to take out execution on the warrant of attorney. Each party had an interest in the fund, dependent upon the contingencies of an award being made wholly or partially in his favour. Such contingent interest was all that *Shuttleworth* had in this fund at the time of his bankruptcy, and that interest only passed to his assignees.

Judgment for the plaintiff.

(a) It would seem, that independently of the special circumstances attending the deposit, the property of *Shuttleworth* in the 3500*l.* would be destroyed upon the sum being placed in the hands of *Fisher* for any purpose, unless the money were in sealed bags, or the like. Upon what is called a deposit of

money, even when made generally, the property in the coin, &c. delivered vests in the so-called depositary, who thereby contracts a debt, or forms some other engagement with the so-called depositor, according to the terms under which the so-called deposit is made.

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ASSUMPSIT, for money had and received, brought to try whether the plaintiff on the 2d of *July* 1839, and thence until the commencement of the action, was

The municipal corporation act, 5 & 6 W. 4. c. 76. s. 139.,

enacts that where any body corporate is seised, in its corporate capacity, of any manors, lands, tenements, or hereditaments whereunto any advowson, or right of nomination or presentation to any benefice or ecclesiastical preferment, is appendant or appurtenant, or of any advowson in gross, or has any right or title to nominate or present to any benefice or ecclesiastical preferment, every such advowson and every such right of nomination and presentation shall be sold as the ecclesiastical commissioners may direct; with a proviso, "that in any case of vacancy arising before any such sale shall have taken place and been completed, such vacancy shall be supplied by the presentation or nomination of the bishop or ordinary of the diocese in which such benefice or ecclesiastical preferment is situated."

The 1 & 2 Vict. c. 31. s. 1., after reciting the above clause, and also reciting that, in some instances, the manors, lands, &c., whereof some municipal corporations are seised, were granted to them with an obligation to nominate, provide, and sustain in certain churches or chapels, able and fit priests, curates, preachers, or ministers for the performance and administration of ecclesiastical duties and rites therein, and for the cure of the souls of the parishioners and inhabitants of the parishes or places thereunto belonging; and although such corporation had from time to time duly nominated and provided such priests, &c., and provided stipends for their sustenance, and had either provided houses for their residence or made allowances in lieu thereof, yet such stipends and allowances had not been fixed or assured by any competent authority, and for want of any regular endowment or augmentation of such curacies, they had not become perpetual cures or benefices presentative, and the curates had not become bodies politic and corporate within the meaning of the 1 G. 1. c. 10. s. 4. and 36 G. 3. c. 83. s. 3. by reason whereof doubts had arisen, whether the right of nominating ministers to such churches and chapels could be sold under the provisions of the 5 & 6 W. 4. c. 76. s. 139.; and it is expedient that such doubts should be removed,—enacts that every right of nomination of every such priest, curate, preacher, or minister, which at the time of the passing of the 5 & 6 W. 4. c. 76. was vested in any municipal corporation, &c., shall and may be sold, as the commissioners may direct, and shall become vested in the purchaser thereof, his heirs and assigns; and that from and after such sale and assurance every such curacy, preachiership, or ministry, shall become a benefice presentative within the 36 G. 3. c. 83. s. 3., and every such curate, &c., a body politic and corporate within the meaning of the 1 G. 1. c. 10. s. 4., &c., and every such purchaser, his heirs and assigns, may present to such benefice, from time to time, when the same shall become vacant, &c.

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By a charter of the 6th *James I.* the tithes, &c. within the lordship of *Bury St. Edmunds*, were granted (subject to a then existing lease thereof for forty years) to the alderman and burgesses of that town, who agreed, after the expiration of the said lease, to pay 8*l.* 10*s.* of the tithes and glebe lands yearly to the curates and ministers of the parish churches of *St. Mary* and *St. James*, in *Bury St. Edmunds* aforesaid. By another charter of the 12 *James I.*—reciting that he expected the alderman and burgesses of *Bury* aforesaid would provide and sustain approved, able, and fit ministers and preachers of the Word, and other officers, in the churches aforesaid necessary, at all times to come—the king granted to them and their successors the whole and entire rectories and vicarages of *Bury St. Edmunds*, and of the aforesaid parish churches, and the advowsons and donations, free dispositions, and rights of patronage of the same churches, and all manner of tithes, &c.

said office.

Plea: non assumpsit.

By a judge's order, the facts of the case were stated for the opinion of the court, pursuant to the 3 & 4 *W. 4.* c. 42. s. 25. as follows:—

The borough of *St. Edmunds*, in the county of *Suffolk*, is an antient borough, and was incorporated by charter of King *James* the First, bearing date the 3d of *April* 1606, by the name of “The alderman and burgesses of *Bury St. Edmunds*, in the county of *Suffolk*.” The said borough consists of two parishes, the parish of *St. Mary*, and the parish of *St. James*; and there is now, and has

the expiration of the said lease, to pay 8*l.* 10*s.* of the tithes and glebe lands yearly to the curates and ministers of the parish churches of *St. Mary* and *St. James*, in *Bury St. Edmunds* aforesaid. By another charter of the 12 *James I.*—reciting that he expected the alderman and burgesses of *Bury* aforesaid would provide and sustain approved, able, and fit ministers and preachers of the Word, and other officers, in the churches aforesaid necessary, at all times to come—the king granted to them and their successors the whole and entire rectories and vicarages of *Bury St. Edmunds*, and of the aforesaid parish churches, and the advowsons and donations, free dispositions, and rights of patronage of the same churches, and all manner of tithes, &c.

The corporation made no endowment, and gave no fixed stipend to the ministers of either of the said churches, but subsequently to the year 1687 appointed two clergymen to each church, the one called a preacher or lecturer, and the other a curate or reader, the former being paid by a salary from the corporation, varying from 100*l.* to 80*l.* a year; and the latter, since the year 1712, deriving his only remuneration from the surplice fees and *Easter* offerings.

The office of curate or reader of the parish of *St. James* having become vacant before any sale had been effected by the corporation:

Held, that it was unnecessary to consider whether the right of presentation or nomination to that office was within the 5 & 6 *W. 4.* c. 76. s. 139. inasmuch as it clearly fell within the provisions of the 1 & 2 *Vict.* c. 31.; and that the necessary consequence of holding it to be within the latter statute, was to bring it within the proviso of the 139th section of the former act; and consequently that such right of presentation or nomination vested in the bishop of the diocese.

been since the dissolution of the monasteries, one church in each parish, and no more.

King *James* the First by his letters patent or charter, dated the 1st of *July* 1608, and in the sixth year of his reign, did (amongst other things) give and grant (subject to a lease for forty years therein mentioned to have been made by the king to Sir *Robert Drury*, Knt.) to the alderman and burgesses of *Bury St. Edmunds*, all manner of tithes and corn, herbage, milk, wool, lambs, calves, fowls, and fruits, coming, growing, and renewing within the lordship of *Bury St. Edmunds* aforesaid, and the precincts of the same lordship of *Bury* aforesaid; and all other tithes, profits, and commodities whatsoever coming, growing, and renewing in the same lordship, and in the precincts of the same lordship, to the late monastery of *Bury St. Edmunds* aforesaid, then dissolved, in times past belonging and appertaining, and which, late, by the almoners of the same late monastery, any time before the dissolution of the same, were yearly gathered; and also all the barns, houses, and buildings in *Bury* aforesaid, called the *Almoners' Barns*, with their appurtenances whatsoever, and all the king's houses, lands, glebes, meadows, feedings and pastures, woods, rents and reversions, with their appurtenances, situate and being in *Bury St. Edmunds* aforesaid, to the said late monastery of *Bury St. Edmunds*, formerly belonging or appertaining, or parcel of the lands and possessions thereof formerly being; and also all the markets and fairs, cottages, stalls and stallages, and the tolls and courts therein mentioned, and generally all tithes of sheaf corn grain, and hay, wool, flax, hemp, and lambs, and all other tithes whatsoever, as well great as small, and all oblations and obventions, coming, growing, or renewing within the borough, town fields, and hamlet of *Bury St. Edmunds* aforesaid, and the tithable places thereof, except, nevertheless, all advowsons of churches

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and chapels whatsoever, to the said lordship and the rest of the premises belonging; and also except all private tithes, oblations, obventions, and mortuaries yearly coming and growing in *Bury* aforesaid, which by the late sexton of the said late monastery had been commonly had, collected, and taken; to hold the same to the aforesaid alderman and burgesses, and their successors of the king, his heirs and successors, as of the manor of *East Greenwich*, in the county of *Kent*, by fealty only, in free and common socage, and not in capite (a) or by knight's service, rendering yearly to the king, his heirs, and successors for the tithes, and for the messuages called *Almoners' Barns* and lands thereto belonging, 28*l.* 3*s.* 4*d.*, and for the markets and fairs, cottages, stalls and stallages, and tolls and emoluments of fairs, and markets and courts, 8*l.* 10*s.* by equal half-yearly portions. And in and by the said letters patent, the said alderman and burgesses did agree and grant with and to the king, his heirs and successors (amongst other things), that they the said alderman, &c. after the expiration of the said lease, would pay 8*l.* 10*s.* of the said tithes and glebe lands, yearly to the use of the curates and ministers of the said parish churches in *Bury St. Edmunds* aforesaid, for and towards their stipend and salary, by equal portions, and thereof would acquit, exonerate, and save harmless the king, and his heirs and successors for ever, and also that they the said alderman, &c. after the expiration of the said lease, would, from time to time, repair, sustain, and amend the chancels of the said churches, and thereof would acquit the king, his heirs and successors.

King *James* the First, by his charter or letters patent dated 17th of *September* 1614, and in the twelfth year of his reign, after reciting therein (amongst other things)

(a) *Sed vide Madox, Baron. Testa de Nevill, 163. a. ; Ser- Anglie. 161. ; Meriet's Case, viens ad Legem, 257. (f.)*

the said letters patent or charter last above-mentioned, and that the said alderman and burgesses had besought the King to extend and augment the franchises and grants therein expressed and contained, for (amongst other purposes) the necessary sustentation of the priests or ministers of the churches in the parishes of *St. Mary* and *St. James* aforesaid, serving God there, and ministering of the sacraments and other divine rights of the church, to be administered to the parishioners, they having cure of their souls; and, after reciting that the tithes, oblations, obventions, and mortuaries so as aforesaid excepted by His Majesty in His letters patent of the 1st of *July*, in the sixth year of His reign, for many years then last elapsed had been by Him and His dear Sister *Elizabeth*, late Queen of *England*, and His antecessor, given, allowed, or appointed (amongst other things) towards the necessary sustentation of the curates and ministers of the Lord in the aforesaid several parish churches, *St. Mary* and *St. James*; and that the same tithes, &c. had been for the whole of such time by the curates and ministers of the same parish churches for the time being respectively, yearly, and from time to time hitherto well and peaceably had and received, and were at that time received as was just; and also reciting that it not being His wish, the same tithes, &c. to the aforesaid Godly uses ordained, appointed, and properly applicable, nor any part or parcel thereof, to withdraw or diminish, or to convert or dispose of to any other use; but, considering the same allowance to be not only small but scarcely sufficient for the sustentation of the ministers and curates in the aforesaid churches, but also that no assurance or certainty had thitherto been had or made by which the ministers and curates of the aforesaid several churches for the time being, or any others to their use, could have had, received, or enjoyed the aforesaid tithes, &c. so as aforesaid excepted, no longer

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than during the good pleasure of Himself, His heirs, and successors, which His Majesty considered to be a too uncertain and little benefit; and also considering that He, by the aforesaid letters patent bearing date the aforesaid 1st of *July* in the 6th year of his reign abovesaid, had given and granted to the aforesaid alderman and burgesses of *Bury St. Edmunds*, and their successors for ever, in fee farm, under the aforesaid yearly rent of 28*l.* 3*s.* 4*d.* as aforesaid, the aforesaid reversion and reversions of (amongst other things) all and every the aforesaid tithes hereinbefore and in the last-mentioned charter specified (except as therein is excepted); and reciting that the King expected that the alderman and burgesses of *Bury St. Edmunds* aforesaid, from time to time, approved, able, and fit ministers, and preachers of the word and other officers in the churches aforesaid, necessary at all times to come, from and after that the aforesaid tithes and other the premises thereinbefore mentioned, to be of the yearly value of 28*l.* 3*s.* 4*d.* should come to their hands and possession, of and with the issues and revenues of the same tithes, and of and with other the tithes, oblations, obventions, gifts, and church-rights by Him, in and by those letters patent thereunder given and granted would provide and sustain; and that in the meantime the same alderman and burgesses, and their successors, and other the inhabitants of the borough aforesaid, would take care that at all times thereafter there be no want of such approved, able, and fit ministers and preachers of the word and other officers in the same churches, which altogether He, the said King, wished; therefore His said Majesty, piously and graciously considering and weighing the causes aforesaid, and willing that the aforesaid churches and all things to the same churches, and to either of them belonging, or the said churches or either of them anywise concerning, should, at all times thereafter, have firm peace and cer-

tainty, did by the said charter now in recital, for Himself, His heirs, and successors, give and grant to the aforesaid alderman and burgesses of *Bury St. Edmunds*, and their successors, the whole and entire rectory and rectories, vicarage and vicarages of *Bury St. Edmunds* and of the aforesaid parish churches of the Blessed Virgin *Mary* and *St. James* the Apostle, and either of them in *Bury* aforesaid, with their rights, members, and appurtenances to the aforesaid then late monastery of *Bury St. Edmunds* aforesaid, then dissolved, formerly belonging or appertaining, and parcel of the possessions thereof sometime being, and the advowsons, donations, free dispositions, and rights of patronage of the same churches, and of either of them; and all and all manner of tithes, as well greater as the lesser, personal and predial, mixed and not mixed, of whatsoever, and whatsoever nature, gender, or kind, and all and all manner of oblations, obventions, mortuaries, fruits, profits, and other rights, dues, and church emoluments whatsoever increasing, renewing, happening, and coming, and which thereafter should happen to increase, come, grow, or renew within the town of *Bury St. Edmunds* aforesaid, and within the lordship of the said town, and within the parishes of the Blessed Virgin *Mary* and *St. James* the Apostle aforesaid, and in either of them, and within the bounds, metes, limits, circuits, precincts, and places titheable of them, and every or either of them; and also the aforesaid two churches or consecrated buildings and temples commonly called the churches of the Blessed Virgin *Mary* and *St. James* the Apostle, in *Bury St. Edmunds* aforesaid, together with the chancels, chapels, sacristries, vestries, libraries, structures, bell-fries, bells, lead, iron, stone, wood, timber, books, and all other edifices, ornaments, goods, and things whatsoever, to the aforesaid churches, or to either of them, in any manner belonging or relating, or to the same

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churches, or either of them, annexed or as a part or parcel of the same, or either of them, had, known, accepted, used, or been reputed: To hold the same, with their rights, members, and appurtenances, unto the aforesaid alderman and burgesses of *Bury St. Edmunds* in the county of *Suffolk*, and their successors, for the sole and proper use and behoof of the same alderman and burgesses of *Bury St. Edmunds* aforesaid, in the county of *Suffolk*, and their successors for ever, to be holden of Him the said King, His heirs, and successors, of his manor of *East Greenwich*, in his county of *Kent*, by fealty only, in free and common socage: And His said Majesty did thereby give and grant to the said alderman and burgesses, and their successors, the said rectories and other the premises in and by the now reciting charter mentioned, to be given and granted with their rights, members, and appurtenances as fully, freely, wholly, and in as ample a manner and form as *John Reeve*, the then late abbot of the said monastery then lately dissolved, or any other his predecessors, abbots of the said monastery, or any sacrist or other officer or minister of the said late monastery, had held and enjoyed the same, and as fully, freely, and wholly, and in as ample a manner and form as the same premises, or any part thereof to His said Majesty's hands, or to the hands of any of His progenitors or predecessors, late Kings or Queens of *England*, by reason or pretext of any dissolution, grant, surrender, or release of any of the late monks, abbots, or priors, or by reason or pretext of any act or acts of parliament, or by reason of any escheat or any other lawful manner, right, or title devolved, or ought to have devolved, and then were or ought to be, saving always, and for ever reserving, to Him, His heirs, and successors the fee-farm and annual rent of 28*l.* 3*s.* 4*d.*, in and by His said letters patent, bearing date the aforesaid 1st day of *July*, in

the sixth year of His reign above-mentioned, to be reserved.

The two charters secondly and thirdly above mentioned were respectively duly accepted by the then alderman and burgesses of the said borough, and the same have been ever since and still are in full force, so far as regards the grants above set forth, save as hereinafter mentioned; and by virtue thereof all the tithes and other matters therein respectively mentioned to have been granted to the said alderman and burgesses of *Bury St. Edmunds*, became vested in the said alderman and burgesses and their successors for ever, and the same, save as hereinafter mentioned, are now vested in the mayor, alderman, and burgesses of the said borough elected under and by virtue of the statute 5 & 6 W. 4. c. 76.

No endowment of the said churches of *St. Mary* and *St. James*, or either of them, has ever been made by the corporation of the said borough. There is no evidence extant relating to the appointment and payment of the ministers officiating in the parish churches of *St. Mary* and *St. James* in the said borough, of an earlier date than 1652, the books and records of the corporation containing the minutes of the proceedings of the corporation previous to that year, and from which such evidence [(if any) might have been obtained, having been lost or destroyed.

From 1652 to 1687, the alderman and burgesses did, from time to time, appoint and provide the ministers necessary for the performance of divine service in the said churches, and for the performance of the occasional duty arising within the said parishes respectively; and there generally were, during all the last-mentioned period, two clergymen appointed to each of the said parishes, that is to say, one preacher or lecturer, and one curate or reader, for each parish; and during the

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same period, or some part thereof, such clergymen were respectively paid salaries by the alderman and burgesses of the said borough, but such salaries were different in different instances. During some parts of the last-mentioned period, there were not any, or not the usual number of, clergymen appropriated to the said parishes or one of them; but the corporation procured, as they were best able, clergymen from *Cambridge* and elsewhere to come over to *Bury St. Edmunds* and perform the duty, from *Sunday* to *Sunday* as occasion required, and paid them for their services accordingly. During all the period last mentioned, the corporation of the said borough exercised the above right of appointment of the said preachers and readers without the control or interference of any other person, except in the following instance: —

The readership of the parish of *St. Mary* having become vacant by the death of one *Piggott* towards the latter end of the year 1675, or beginning of 1676, one *William Stewkley*, an orthodox divine, and one *John Bull*, a young man not in priest's orders, were candidates for the vacant office; and a general hall of the corporation was called for the said election on or about the 2d of *February* 1676, when the alderman and some of the burgesses protested against the election of the said *J. Bull* as being unqualified for the office, but upon a poll being taken, the said *John Bull* had a majority of one vote over the said *W. Stewkley*. The said *W. Stewkley* was nevertheless recommended to the bishop of the diocese, by the consent of the alderman and the chief of the corporation, as well approved for the said office; and the said bishop did thereupon licence him to serve the said cure, and also gave his determination that the said *J. Bull* could not undertake such an office, being not capable by qualification, and did inhibit him the said *J. Bull* from giving further trouble to the said

W. Stewkley therein. The said *J. Bull* and his party in the corporation not having submitted to the said bishop's determination, and having given further disturbance to the said *W. Stewkley* and the corporation, King *Charles the Second* sent a royal message to the corporation, desiring them to acquiesce in the choice of the said *W. Stewkley*, which message having been disregarded by some of the said corporation, the said King *Charles* sent in confirmation thereof a royal letter, dated the 8th of *July* 1676, recommending it to all parties concerned, that for the peace of the parish and the said corporation they should all acquiesce therein, and accept the said *W. Stewkley* for reader of the said parish church according to the determination and licence of the said bishop, without any further trouble or opposition thereunto.

At a meeting of the corporation held on the 13th of *July* 1676, the said royal letter of King *Charles the Second* was read, and it was thereupon unanimously resolved by the members of the corporation then present, that they would accept and receive the said *W. Stewkley* for reader of the said parish, according to the tenor of the said letter, and acquiesce in the determination of the Bishop of *Norwich* on that behalf. At the same meeting it was unanimously resolved, that 20*l.* be allowed to the said *W. Stewkley* during his continuance in the place of reader for the said parish, as the last and former readers there had had.

During the said period, from 1652 to 1687, there is only one instance of the corporation having dismissed or removed any clergyman from the offices of preacher or reader of either of the said parishes of *St. Mary* and *St. James*, and which was as follows:—At a meeting of the corporation held on the 3d of *March* 1669, it was resolved (*nem. con.*); first, that upon the representation of His Majesty's pleasure, made known at this meeting to the corporation by Mr. Recorder, touching

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Mr. Meriton (who at that time was preacher at *St. James's* parish), he was no longer a fit person to be continued minister of the said parish of *St. James*, in the said borough; and, secondly, that the corporation should, before the removal of the said *Mr. Meriton*, and before they choose another minister in his place, acquaint the lord bishop of the diocese with His Majesty's pleasure, (as *Mr. Recorder* had it from His Majesty's own mouth), and with the votes of the corporation thereupon, desiring his lordship's concurrence therein: and it was thereupon ordered by all the members of the corporation then present, that *Mr. Recorder* be desired to acquaint the lord bishop with His Majesty's pleasure, and to desire his concurrence therein.

At a meeting of the corporation held 17th of *March* 1669, *Mr. William Lyng* was elected minister of the parish of *St. James*, in the place of *Mr. Meriton*, but refused to undertake the office except until the following *Michaelmas*; and the corporation agreed to pay him at the rate of 100*l.* a year.

At a meeting of the corporation held the 18th of *August* 1670, *Mr. William Harbut* was elected preacher, but declined the office; and at a meeting held the 16th of *October* 1670, *Mr. Harbut's* refusal being then made known, it was resolved by the corporation that the members should procure a preacher in rotation, and find him diet for the day, until a minister should be regularly settled; such occasional minister to have 20*s.* each *Sunday*.

At a meeting held the 28th of *January* 1670, it was proposed and consented unto, that before the corporation would proceed to the election of a minister for the parish of *St. James*, all those members who had not in their turns provided one to preach upon approbation on the Lord's day, should, in their course, provide; but afterwards a letter of caution, sent from Sir *John Dun-*

combe, secretary to King *Charles* the Second, to Mr. Recorder, concerning this election, being produced and publicly read, it was agreed that the recorder should be desired to speak with Sir *John*, desiring him that he would be pleased to be satisfied by Dr. *Gunning*, Bishop of *Chichester*, touching the qualification of Mr. *Edwards*, who formerly had preached in that parish church upon approbation; which being done, and the corporation having notice of the result thereof, then the alderman might, when he pleased, call a hall and proceed to an election of a minister, the former proposition notwithstanding.

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At a meeting held 4th of *March* 1670, the said Mr. *Edwards* was elected preacher of the said parish of *St. James*, of which election he was to have notice; and if he should accept thereof, then the alderman, principal burgess and burgesses of the council were to treat with him upon terms touching his labour, and what salary and allowance he should have for the same.

At a meeting of the corporation of the said borough held on the 21st of *February* 1687, it was resolved that Mr. *Nicholas Claggett*, the minister or preacher of *St. James's* parish, Mr. *Stewkley*, curate of *St. Mary's* parish, and Mr. *Bull*, curate of *St. James's* parish (out of the great respect which was borne to them, not only by the said corporation, but also by the inhabitants of their respective parishes, and of their great abilities for the performance of their several employments), should be continued to officiate in their respective churches, as the respective ministers and curates thereof, during their lives, and should every of them have their several and respective salaries agreed and settled upon them for their respective lives; and that the same should be severally granted and corroborated to them under the seal of the corporation for their lives respectively, they performing their several places in their respective churches according as they had

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done for several years then last past; and that, in pursuance of the said resolution, the seal should be set by the then mayor to the several instruments then drawn and produced to the said corporation, in pursuance of the said resolution, for the several ministers and curates therein concerned; and the mayor did then accordingly seal the said instruments.

At a meeting of the corporation held on the 11th of *October* 1695, it was ordered (*nem. con.*), that unless the said Mr. *Bull*, curate of the parish of *St. James*, did settle and reside within the said borough, at or before *Christmas* then next, and officiate in his said office, he should be discharged from the same; and that the said Mr. *Bull* from *Michaelmas* last should be allowed from the corporation at the rate of 15*l.* per annum, as long as he should continue in the exercise of his said office as aforesaid. No steps appear to have been taken for some years by the corporation to enforce the last-mentioned resolution until the 20th of *September* 1700, on which day, at a meeting of the corporation then held, it was ordered by the alderman and members then present (*nem. con.*) that the bishop of the diocese should be acquainted that the said corporation intended to remove the readers in each parish within the said borough, for their neglect, and that such their neglect should be assigned as should be adjudged requisite, and that the answer of the said bishop thereunto should be imparted to the said corporation at their next meeting. It does not appear, from the corporation books or records, whether any communication was made to the bishop in pursuance of the last-mentioned order of the corporation, or whether he returned any answer thereunto. At a meeting held on the 21st of *May* 1703, the said Mr. *Bull* was removed from his office and place of curate or reader of the said parish of *St. James*, within the said borough; and at the same meeting Mr. *Robert Blemell*

resigned, in the usual form, his office of reader of *St. Mary's* parish, and Mr. *Henry Burrell* jun. was appointed in his stead.

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At the same meeting it was ordered and agreed, that the curate or reader to be chosen for the said parish of *St. James*, within the said borough, then vacant by the removal of the said Mr. *John Bull*, clerk, should be chosen under the conditions, agreements, and limitations following, viz. that he should perform the said office *without any salary* from the common stock of the said town, or payment from the said body; that he should read the common prayer, according to the usage of the Church of *England*, twice upon four days in every week, namely, upon *Sunday, Monday, Tuesday, and Wednesday*, within the said parish church publicly, and twice upon every holiday; that he should be resident within the said borough during the time he should continue in the said office; that he should visit the sick; that he should attend the burials of the dead within the said parish, and that he should perform all other duties incident to the said place. And at the same meeting, Mr. *Nathaniel Firth*, clerk, was elected into and accepted the said office upon the terms just mentioned.

At a meeting of the corporation, held on the 19th of *July* 1707, Mr. *Firth* resigned, and Mr. *James Challis* was elected into and accepted the said office of curate or reader of *St. James's* parish upon the same terms.

At a meeting of the corporation, held on the 4th of *June* 1709, the said Mr. *Challis* resigned, and Mr. *John Brinkley* was appointed curate or reader of *St. James's* parish, upon the same terms as Mr. *Firth* was.

At a meeting of the corporation, held on the 19th of *May* 1712, it was declared and agreed, that the person to be chosen curate or reader of the parish of *St. Mary*, then vacant by the death of *Richard Major*, clerk, deceased, should be chosen under the proposals and con-

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ditions following, that is to say, that he accept the said office *without any salary*, payment, or reward, from the alderman and burgesses in their public capacity of the said borough; that he read prayers twice every day for four days in the week, &c.; that he perform all other duties incident to the said office, and that he have liberty to gather the last *Easter* offerings. And at the same meeting *Robert Butts*, clerk, was chosen reader, and accepted of the said office under the proposals, conditions, and agreements above mentioned.

At a meeting of the corporation held on the 13th of *July*, 1751, the Rev. *Arthur Kynnesman* was chosen and appointed curate or reader of the said parish of *St. James*, in the place of the said *John Brinkley*, who had died; and he then accepted the said office upon the same terms as Mr. *Frith* had been elected; except that, in addition thereto, it was then expressly provided that the said *Arthur Kynnesman* should take and receive to *his own use all surplice fees* theretofore usually taken and received by former curates or readers of the said parish.

During the period extending from the year 1751 to the year 1810 inclusive, as vacancies occurred from time to time in the said office of curate or reader of the said parish of *St. James*, in the said borough, by the voluntary resignation or death of the former holder thereof, divers individuals were elected into the said office by the corporation, and they respectively accepted the same upon the same terms as the said *Arthur Kynnesman* had been appointed.

At a meeting of the corporation held on the 8th of *May*, 1829, the Rev. *E. W. Matthew* was, on the death of the Rev. *W. Stocking*, the late holder of the said office, elected by the corporation, curate or reader of *St. James's* parish; and he then accepted the said office on the same terms as the said *Arthur Kynnesman*

had held the same; except that in addition thereto, it was then first expressly provided that the said *E. W. Matthew* should catechise the poor of the said parish of *St. James*.

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At a meeting of the corporation held on the 2d of *October*, 1834, the Rev. *C. Atkinson* was elected into and accepted the said office of curate or reader of *St. James*, the same being vacant by the death of the said *E. W. Matthew*, upon the following terms, that is to say, that the said *C. Atkinson* should accept the said office *without any salary*, payment, or reward from the alderman or burgesses of the said borough in their public capacity; that he should read prayers twice every *Sunday*, and once on three days in the week, to wit, upon *Monday*, *Tuesday*, and *Wednesday* mornings publicly, within the parish church of *St. James* aforesaid, and twice upon every holiday, or day of humiliation or thanksgiving appointed by authority of parliament, or other legal appointment, as had hitherto been used and accustomed, and twice every day also in the week preceding the festivals of *Easter*, *Whitsuntide*, and *Christmas*; that the said *C. Atkinson* should be resident within the said borough during the time he should continue in the said office; that he should visit the sick, attend the burials of the dead, and catechise the poor within the said parish of *St. James*, and should perform all other duties incumbent upon the said office; and that he should take and receive, to his own use, all surplice fees theretofore usually taken and received by former curates or readers of the said parishes; and that the said *C. Atkinson* should, when he should be desirous and intend to relinquish and resign the said office, give to the alderman for the time being three months' notice in writing of such his desire and intention.

Until the year 1687 the appointment of preachers and readers was made during pleasure only. But during

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the whole period from the year 1687 to the year 1834 there were always two clergymen appropriated to each of the parishes in the said borough, viz. one preacher or lecturer and one curate or reader; and there is no instance during the last-mentioned period of any preacher or curate having been removed or dismissed from his office except in the year 1703 above mentioned; but there are sixteen instances during the same period of the office of reader having been vacated by surrender to the corporation, and their acceptance of the same.

The preachers of the said parishes were in the year 1663 paid by the corporation a salary of 100*l.* per annum, which was subsequently, in or about the year 1696, as to *St. James's* parish, reduced to 80*l.* per annum, and in the year 1814 was again advanced by the corporation to 100*l.* per annum, at which it has continued to this time.

The readers of the said parishes respectively have not, since about the year 1712, received any salary from the corporation; but have for the same period derived the only remuneration for their services from the surplice fees payable at baptisms, marriages, and burials, and from the *Easter* offerings paid by the inhabitants of the said parishes respectively.

The said *C. Atkinson* died on the 7th of *May* 1839, and the said office of curate or reader of the parish of *St. James* became vacant.

No sale of the right of nominating and appointing the curate or reader of the said parish of *St. James* had, at the time of the death of the said *C. Atkinson*, been effected by the mayor, alderman, and burgesses of the said borough under and by virtue of the statutes 5 & 6 *W. 4. c. 76. s. 139.* and 1 & 2 *Vict. c. 31.*, or either of them, nor has any endowment of the said office been hitherto made.

The whole county of *Suffolk* was formerly in the dio-

cese of *Norwich*; but, before the death of the said *C. Atkinson*, that part of the county of *Suffolk* within which the borough of *Bury St. Edmunds* is locally situate, was, under and by virtue of the statute 6 & 7 *W. 4. c. 77.*, and an order in council of His late Majesty King *William the Fourth*, bearing date the 19th of *April* 1837, made in pursuance thereof, transferred from the diocese of *Norwich* to the diocese of *Ely*.

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Upon the death of the said *C. Atkinson*, a question arose in the said borough as to whether the right of appointing a successor to the said *C. Atkinson* in the said office had become on his death vested in the bishop of *Ely* as bishop of the diocese, or whether such right still belonged to the mayor, aldermen, and burgesses of the borough.

At a meeting of the corporation of the borough, held on the 8th of *June* 1839, the defendant was, in the usual form, appointed by the corporation to the said office of curate or reader of the parish of *St. James*, and he then accepted the said office upon the same terms as the said *C. Atkinson* had held the same.

On the 2d of *July* 1839, the Lord Bishop of *Ely*, by an instrument under his hand and official seal, licensed the plaintiff to the said office of curate or reader of the parish of *St. James*; and in the said instrument it is stated, that the said bishop authorised the plaintiff to receive and enjoy the surplice fees and all other profits and advantages whatsoever belonging to the said office of curate or reader, and theretofore usually taken and received by former curates or readers of the said parish church.

The defendant, shortly after his appointment to the said office by the corporation of the said borough, entered upon the performance of the duties of the said office and the emoluments, to the exclusion of the plaintiff therefrom respectively, from the said 2d of *July* to

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about the 14th of *December* 1839, when an arrangement was entered into between the defendant and the corporation on the one part, and the plaintiff on the other part; that until the question as to the right of nomination to the office should be decided, the duties of the office should be performed, and the profits thereof be received, by a third party, who should keep an account of such profits, and should, after deducting thereout after the rate of 2*l.* 2*s.* per week for his own remuneration for the time he should do the duties of the said office, pay the balance, if any, to the plaintiff or defendant, according as the said question should be decided in favour of the one or the other.

[The case, after enumerating various sums received by the defendant in right of the said office, as surplice fees, fees for searches, &c., and fees from the superintendent registrar of the district, stated that the defendant had never accounted to the plaintiff, or paid him the said sums of money.]

It is agreed between the parties, that the court shall be at liberty to draw the same inferences as a jury might do from the above facts.

The question for the opinion of the court upon the facts above stated is, whether the right of nominating and appointing a clergyman to the office of curate or reader of the parish of *St. James*, in *Bury St. Edmunds* aforesaid, was, upon the death of the said *C. Atkinson*, vested in the Bishop of *Ely*, as bishop of the diocese in which the said borough is situated. If the court shall be of opinion that the right of nominating and appointing a clergyman to the office of curate or reader of the said parish of *St. James* was, upon the death of the said *C. Atkinson*, vested in the Bishop of *Ely*, then a judgment is to be entered for the plaintiff by *relictâ verificatione*, and confession, for nominal damages; but if the court shall be of opinion that such right was not, at

the time of the death of the said *C. Atkinson* vested in the Bishop of *Ely*, a *nolle prosequi* is to be entered on the part of the plaintiff, and a judgment thereon accordingly entered for the defendant immediately after the decision of the case, or otherwise, as the court shall think fit; it being agreed, in pursuance of the statute 3 & 4 *W. 4. c. 42. s. 25.*, that all the proceedings herein shall be pursuant to the directions and decisions of the court.

Either party to be at liberty to turn the special case into a special verdict.

Stephen Serjt. (Worlledge was with him) for the plaintiff. The questions raised in this case will depend upon the construction to be put upon the 139th section of the municipal corporation act, 5 & 6 *W. 4. c. 76.*, and the 1st section of the 1 & 2 *Vict. c. 31.*, which was passed to explain the former statute. In the first place, it is submitted that the office of curate or reader of the parish of *St. James*, in *Bury St. Edmunds*, is a benefice or an ecclesiastical preferment, within the 5 & 6 *W. 4. c. 76. s. 139. (a)*;

(a) Which enacts, "That in every case in which any body corporate, or any particular class, number, or description of members, or the governing body of any body corporate, now is or are, in their corporate capacity, and not as charitable trustees, according to the meaning and provisions of this act, seised or possessed of any manors, lands, tenements, or hereditaments whereunto any advowson or right of nomination or presentation to any benefice or ecclesiastical preferment is appendant or appurtenant, or of any advowson in gross, or hath or have any right or title to nominate or present to any benefice or ecclesiastical pre-

ferment, every such advowson and every such right of nomination and presentation shall be sold, at such time and in such manner as the commissioners appointed, &c., may direct, so that the best price may be obtained for the same; and it shall be lawful for the council of such body corporate, and they are hereby authorised and required, with the consent of the said commissioners, or any three or more of them, in writing under their hands, to convey and assure, under the common seal of such body, such advowson or such right of nomination or presentation as aforesaid, to the purchaser or purchasers thereof respectively,

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canon law, and by the statutes of the realm. The vicarage became a benefice with cure of souls, and the monks held *in proprietatem*, in some sort, as a lay fee. *Gibson*, 719.; *Mallet v. Trigg*. (a) But after the statute of appropriations, the monks were too subtle and cunning for the law; and, still, nevertheless, obtained appropriations as annexed to their tables, as before, under the plea of poverty and inability to support themselves. These *uniones ad mensam*, for the sustentation of the monks, were always presumed in law to be in *utroque jure*; and it was a universal rule, that they were never vacant, but that there was a perpetual plenarty; as it has been held that the canon *de supplendâ negligentia*, which gave the right of presentation on lapse, did not apply to such appropriations. The monks may thus be said to have been the immortal incumbents, had the cure of souls remaining in them, and the minister whom they employed was a mere stipendiary." It is clear, therefore, supposing this not to have been an appropriation *ad mensam*, that it must necessarily have been in some manner endowed under the foregoing statutes; and even if it were an appropriation *ad mensam*, there appears to be no distinction between such appropriations and perpetual curacies; and it has been said that they differ only in name; 1 *Burn's Ecclesiastical Law*, by *Tyrwhitt*, 77. n. (z). It is submitted that whatever the original appropriation may have been, the office in question is in effect a perpetual curacy. It is said, "Of curates there are two kinds; first, temporary, who are employed under the spiritual rector or vicar, either as assistant to him in the same church, or executing the office in his absence in his parish church, or else in a chapel of ease within the same parish belonging to the mother church; the other,

(a) 1 *Vern.* 42.

by way of distinction, called perpetual, which is where there is in a parish neither spiritual rector nor vicar, but a clerk is employed to officiate there by the impropriator;" *Burn's Ecclesiastical Law*, by *Tyrwhitt*, vol. 2. p. 54 *a*. Augmentation by the governors of Queen *Anne's* bounty is not necessary to constitute a perpetual curacy, although one kind of perpetual curacy has been created by one of the statutes of augmentation, the 1 G. 1. c. 10. s. 4. It is not distinctly stated in the special case that the bishop was in the habit of licensing the curates, but one remarkable example is given in which a party was so licensed, and there is no reason to suppose it to have been a solitary instance. In point of law, every curate must be licensed; 2 *Burn's Ecclesiastical Law*, 61.; *Watson's Clergyman's Law*, 207. And if a common curate must be licensed, *a fortiori* must the curate or reader filling the office in question. It is not absolutely essential to contend that he is a perpetual curate; he may, to use the term employed by Lord *Mansfield* in *Powell v. Milbank* (*a*), be a *free* curate. It is material to observe that this is not merely a district where the curate is authorised to read prayers, but a parish in which he alone has the cure of souls, and has the duty imposed upon him of administering the sacrament, and visiting the sick. It is clear, therefore, that he is in the nature of a perpetual curate. It is sufficient to make out that the office is either a benefice or an ecclesiastical preferment. Lord *Coke*, in the 2 *Inst.* 29., says "*Beneficium* is a large word, and is taken for any ecclesiastical promotion or spiritual living whatsoever." Whatever the amount may be, if certain revenues are attached to an ecclesiastical preferment on which the party may live, it is submitted that it is a spiritual living. It is clear that this is either an "ec-

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(a) 1 T. R. 401. n.

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clesiastical benefice or promotion" within the act of uniformity, 13 & 14 *Car. 2. c. 4. s. 6.*, and the one is not distinguishable from the other; and in order to hold the office in question, and to administer the sacrament, the curate or reader must, by the fourteenth section of the same statute, be in priest's orders. If this be not an ecclesiastical benefice or preferment, the party holding it may be a dissenter, and need not subscribe the thirty-nine articles, pursuant to the 13 *Eliz. c. 12. s. 1.*, or read the book of common prayer, according to the 13 & 14 *Car. 2. c. 4. s. 6.*, or take the oaths of supremacy and abjuration, under the 9 *G. 2. c. 26.* It is contended that here there is that which is tantamount to an endowment; but if not, *Bonsey v. Lee (a)* shews that the corporation would be compelled to make a proper allowance out of the tithes for the support of the curate. In *The Attorney-General v. Brereton (b)*, Lord Hardwicke says, that it is contradiction in terms to say that a perpetual curate is removable at will and pleasure; and he seems to have considered it a material circumstance that the curate there, as here, took the surplice fees.

But supposing that this office does not satisfy the terms "ecclesiastical benefice or preferment" strictly considered, the question is, whether it must not be taken to be an ecclesiastical preferment within the meaning of the municipal corporation act, looking at the obvious intention with which that act was passed.

It is a sound general principle in the construction of statutes, that the apparent intention of an act is to be more regarded than the particular words used. *Plowden*, 204, 205.; *Bawderok v. Mackaller (c)*, *Carver v. Pinkney (d)*, *The King v. Hall (e)*, *The Queen v. The Corporation of Liverpool. (g)* The policy of the municipal cor-

(a) 1 *Vern.* 247.
 (b) 2 *Ves. sen.* 425.
 (c) *Cro. Car.* 330.

(d) 3 *Lev.* 82.
 (e) 1 *B. & C.* 123.
 (g) 8 *Ad. & E.* 176.

poration act was clearly to compel corporate bodies to dispose of all church preferments, both because dissenters would probably be admitted in considerable numbers into corporations, and also to prevent the new elective franchise, thereby introduced, from being used with a view to the offices in the gift of such corporations. If that were so, the present office is as much within the object of the act, and the mischief meant to be avoided, as any ecclesiastical preferment can possibly be conceived to be.

Secondly. If it be doubtful whether this be an ecclesiastical office or preferment within the 5 & 6 *W. 4. c. 76. s. 189.*, it is at all events clearly brought within that statute, by the 1 & 2 *Vict. c. 31.(a)*; and if so, then all the requisitions and provisions of the former act attach.

(a) Whereby after reciting the 139th section of the 5 & 6 *W. 4. c. 76.*, and also reciting that, "in some instances, the manors, lands, tenements, or hereditaments whereof some municipal corporations are seised, were granted to them with an obligation to nominate, provide, and sustain in certain churches or chapels able and fit priests, curates, preachers, or ministers for the performance and administration of ecclesiastical duties and rites therein, and for the cure of the souls of the parishioners and inhabitants of the parishes or places thereunto belonging, and although such corporations have from time to time duly nominated and provided such priests, curates, preachers or ministers, and paid stipends for their sustenance, and have either provided houses for their residence or made allowances in lieu thereof, yet such stipends and allowances

have not been fixed or assured by any competent authority, and for want of any regular endowment or augmentation of such curacies they have not become perpetual cures or benefices presentative, and the curates have not become bodies politic and corporate within the meaning of the 1 *G. 1. c. 10. s. 4.* and 36 *G. 3. c. 83. s. 3.*, by reason whereof doubts have arisen whether the right of nominating ministers to such churches or chapels can be sold under the provisions of the 5 & 6 *W. 4. c. 76.*, and that it is expedient such doubts shall be removed," it is declared and enacted "That every right of nomination of every such priest, curate, preacher, or minister, which, at the time of the passing of the 5 & 6 *W. 4. c. 76.*, was vested in any municipal corporation, or in any member of such corporation, or in any member of such corporation in

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A doubt arose after the passing of that act, whether such an office as the present fell within it, and to obviate such doubt, the 1 & 2 *Vict. c. 31.* was passed. It will be said that the latter does not contain a proviso as to the right of presentation in case of a vacancy before sale, similar to that which is to be found in the 139th section of the municipal corporation act. It is clear that the 1 & 2 *Vict. c. 31.* is a legislative exposition of the intention of that statute, and that the case is retrospectively brought within its provisions. It is hardly necessary to remind the court of the authorities with respect to the construction of acts *in pari materiâ*; *Bac. Abr. Statute* (I. 3.), *Gale v. Laurie* (a), *Edwards v. The Bishop of Exeter*. (b) This is a much stronger case, for one of the statutes actually recites the other; and it is submitted that they are to be read as one continued enactment; for it is to be observed that the 1 & 2 *Vict. c. 31.* is not merely a declaratory act.

virtue of his office as such, shall and may be sold at such time and in such manner as the commissioners may direct, and shall by such conveyance or assurance as is in the said act mentioned become vested in the purchaser thereof, his heirs and assigns; and that *from and after such sale* and assurance every such curacy, preacher-ship, or ministry *shall become a benefice presentative* within the meaning of the 36 *G. 3. c. 86. s. 3.*, and every such curate, preacher, or minister, and his successors for ever shall become and be a body politic and corporate within the meaning of the 1 *G. 1. c. 10. s. 4.*, and shall have perpetual succession and shall be capable of taking

and holding in perpetuity all such lands, tithes, tenements, hereditaments, monies, goods, and chattels, as shall be granted unto or purchased for them respectively by the governors of the bounty of Queen *Anne*, or by other persons contributing with the said governors as benefactors; and every such purchaser, his heirs and assigns, may present to such benefice from time to time, when and as the same shall become vacant, in the same manner to all intents and purposes, as patrons may now present to benefices presentative."

(a) 5 *B. & C.* 156.; 7 *D. & R.* 711.

(b) 6 *New Cases*, 146.; 7 *Scott*, 679.

Bompas (*Biggs Andrews* was with him), *contra*. It has been argued that all appropriations were originally rectories; that by force of the statutes 15 *Rich.* 2. and 4 *H.* 4. c. 12. they were all made vicarages; and that this must have been a vicarage endowed, unless it was held, under a dispensation, by the monastery *ad mensam*. It is apprehended that it is not correct to say that all appropriations were originally rectories. [*Tindal* C. J. After accepting the grant contained in the second charter, are you in a condition to dispute that the parish of *St. James* is either a rectory or a vicarage? The corporation, doubting whether it was a rectory or a vicarage, took care to have both words introduced. Do you say that it is neither?] It is not necessary to decide that point: there may be appropriations without any endowment; for the 15 *Rich.* 2. c. 6, and 4 *H.* 4. c. 12. relate to *future* appropriations; and this may have been an appropriation made previously to the passing of those statutes. It is clear that at the time when the charters were granted, there was no endowment; but the ministers were dependent on the free will of the King; for all that the crown seems to have been liable to was, to provide clergymen, paying them whatever salary it thought proper. Since the grant to the corporation, the latter have dealt with the subject of the grant as they would have a right to do supposing it to be a perfect appropriation, providing clergymen for the performance of divine service, and paying them what salaries they pleased. During part of the time they do not seem to have employed two clergymen for each parish; and there is nothing in the charters to say that they must provide four ministers, or that they need have any curate at all. It is stated that they procured clergymen from *Cambridge* to perform occasional duty, and paid them for their services, just as the monastery might have done when none of its members could officiate. It is

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clear that previously to 1687 the appointments were only during pleasure. In 1703 the duties of the office of curate are defined; but there is nothing to shew that he had power to administer the sacrament. [*Tindal C. J.* The curate was to perform "all other duties incident to the said place." Would not those include the administration of the sacrament?] In defining his duties, the inferior ones would not have been stated, and the superior omitted; and if he had, in point of fact, administered the sacrament, it would have been set out in the case. Whenever the preacher and curate are mentioned together, the curate is named last, as though subordinate to the preacher. [*Tindal C. J.* Which of them would have the cure of souls? The preacher need only be in deacon's orders; but he could not administer all the sacraments until he was a priest. *Maule J.* It was the duty of the curate to visit the sick; would he not then administer the sacrament?] It is contended that neither had the cure of souls; but that both were mere stipendiaries. Sir *William Scott*, in his judgment in the *Duke of Portland v. Bingham*, part of which has already been quoted (a), says, "From this root sprung the peculiar kind of appropriation without a vicarage endowed: and this is the origin of stipendiary curacies, in which the impropriator is bound to provide divine service, but may do it by a curate not instituted, but only licensed, by the bishop, and thus an impropriator might reckon himself under no obligation to present a vicar to the bishop for institution, but solely to provide for the service of the church as the monks did by a licensed curate. Since that time the statutes of dissolution enact, that benefices of every description should be held as they had been held by the dissolved religious houses; and a grantee who has obtained what was

(a) *Antè*, p. 93.

before held as above described, *ad mensam pleno et utroque jure*, would have the complete incumbency as *intitulatus* and *beneficiary*. If such an impropriator should take orders, he might perform the offices of the church without institution, only taking the oaths imposed by later statutes. And it would be the mere circumstance of not being in orders, that would prevent him from exercising his ecclesiastical rights in full form, as those spiritual persons, the monks, did before. But it was not so in ordinary impropriations, in which there had been a vicarage endowed; because the vicar holds by something extrinsic of the impropriator."

It is apprehended that here, if the corporation had chosen to appoint regular chaplains, they might have directed them to perform the duties of preacher and curate as part of their employment. What is there to prevent the preacher and curate from belonging to the class referred to by Sir *William Scott*? Although they have been in later times appointed for life, that was matter of agreement, and not matter of right. Admitting that augmentation by Queen *Anne's* bounty is not necessary to constitute a perpetual curacy, here the office in question has not been augmented, and the only bearing the statutes of augmentation have upon the case, is to shew that perpetual curacies can only be created by means of some kind of endowment or another. With respect to the question whether the curate was licensed or not, the fact of a licence being required, (which originated in a canon of the church, though afterwards enforced by statute,) could have no effect so as to interfere with any temporal right. Here, the corporation might, at any time, have employed a party in priest's orders to do the duties of the church, without a licence. It does not appear that any one was ever appointed to this office in order to be ordained from it; from which it would seem that the clergymen were of that class which

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does not require a licence to preach. But it is submitted that the question of licence has no bearing upon the case. A readership is not an ecclesiastical preferment; *Martyn v. Hind* (a); and, according to the common law, a perpetual curate is removable at the pleasure of the impropriator; *Bott v. Brabason* (b), *Pawley v. Wiseman* (c), *Price v. Pratt* (d), *Birch v. Wood* (e), *Burn's Eccles. Law*, by *Tyrwhitt*, vol. ii. title *Curates*, 54. a, note (r). [*Tindal* C. J. The question will, at last, turn upon the 1 & 2 *Vict. c. 31.*, for if there are more comprehensive words in that act which meet the case, the court will not feel itself called upon to decide whether it falls within the municipal corporation act.] The obligation on the corporation is merely to provide clergymen or ministers. To what, then, can the bishop appoint? for what period, and for what salary? Both the preacher and the curate are appointed for any period, at any salary, and to perform such duties as the corporation think right. If they please, they might, instead of appointing for life, only appoint until sale. By the express words of the 1 & 2 *Vict. c. 31.*, the office sold is not to become a benefice presentative until after sale. In considering this act, it is material to determine what is to be sold; for if the preachership and readership are disposed of separately, each will become a separate and distinct benefice. It may well be doubted whether it ever was intended that the corporation should support and pay two benefices in the same church. [*Maule* J. Supposing the corporation to be the rectors, their vendee would not purchase the rectory, but merely the right of supplying the ministers to the church. *Tindal* C. J. The vendee might supply the church with one or two clergymen, as might be thought requisite.] It is apprehended that what is to

(a) *Cowp.* 437.

(b) *Noy*, 15.

(c) 3 *Keb.* 614.

(d) *Bunb.* 273. *S. C.* 1 *Bar-*
nard. 233.

(e) *Salk.* 506.

be sold is, that which is, on sale, to become one benefice presentative; and that the whole must be sold, and not a part. But if the sale and appointment must be co-extensive, then the bishop cannot appoint except to the whole. Here, there is no vacancy, but a merely voluntary interval in the performance of the duties of the office. It may be admitted to be a general rule, that statutes *in pari materia* are to be construed together; but to use the words of Lord *Mansfield*, in *Rex v. Croke* (a), where a special authority is delegated by act of parliament to particular persons to take away a man's property and estate against his will, it must be strictly pursued. The municipal corporation act is merely applicable to benefices or preferments. In arguing upon the 1 & 2 *Vict. c. 31.*, it may be properly assumed that this office is not within the former act. How, then, is it brought within that statute? It is not declared, in terms, to be within it, but only that it shall be sold in such time and in such manner as directed by that act. Even assuming that it is brought within the proviso of the municipal corporation act, the question still arises, whether there is such a vacancy as was contemplated by that statute. If it is to be of the whole incumbency, then there is no vacancy. If this is held to be within that act, then there would be two benefices; but if it is to be considered as only one benefice, or capable of becoming but one benefice, then there is no vacancy. It is submitted that here there is nothing to prevent the whole being sold on the death of one of the clergymen, without bringing the case within the statutes against simony; and if that be so, then there is no vacancy. But admitting that it is brought within the municipal corporation act so as to be the subject of sale, there are abundant reasons why it should not be within the pro-

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viso to that statute. The recital in the 1 & 2 *Vict.* c. 31. is sufficient to shew that this is not a case in which there can be a vacancy to which the bishop can appoint. If the fees received by way of stipend by the curate, be by agreement between him and the corporation, the bishop can have no right to authorise the plaintiff to receive those fees. It would seem as if the bishop thought he could not properly make an appointment, as he has only licensed the plaintiff to the office of curate or reader. [*Tindal* C. J. The question for our consideration is, whether he has the right to appoint.] It is said that the 1 & 2 *Vict.* is an enacting as well as a declaratory act. That circumstance shews that the latter statute was intended to differ from the former: the only declaratory part in the 1 & 2 *Vict.* is that which directs the sale; and it is submitted that this office is brought within the municipal corporation act merely to be sold, and for no other purpose.

Stephen Serjt., in reply. With respect to the argument on the other side, that the right to supply the church with ministers is all that can be sold, and that there is, therefore, no power to sell the office of curate or reader by itself, and that there is no vacancy of any thing that the corporation are authorised to sell; it may be contended on the facts disclosed in the special case, that there are here two distinct ecclesiastical offices, and that one of them has become vacant. If necessary to decide the point, the curate is the proper incumbent, and not the preacher. The former must be taken alone to have the cure of souls, and a vacancy in his office is to be considered a general vacancy. The recitals in the 1 & 2 *Vict.* c. 31. shew that it was framed to meet this very case. Even supposing this to be a mere right to supply the church, that statute says, not that such right shall be sold, but the right of nomination. It is clear that

the corporation had a right to appoint for life, and that that right has passed to the bishop. If the 1 & 2 *Vict. c. 31.* were to be construed so strictly as contended for, and it were held that it gives the power of sale alone, there would be no provision applicable to this case for investing the proceeds of the sale. No sufficient reason has been assigned why the proviso in the municipal corporation act should not extend to the subject matter of the 1 & 2 *Vict. c. 31.* In the former act the legislature clearly expresses an opinion that corporative bodies are improper patrons of ecclesiastical preferments, and it is obvious that it was in order to carry out that principle to its full extent that the 1 & 2 *Vict. c. 31.* was framed.

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TINDAL C. J. now delivered the judgment of the court.

The question which is stated for our opinion at the end of this special case, is, whether the right of nominating and appointing a clergyman to the office of curate or reader of the parish of *St. James*, in *Bury St. Edmunds*, was, upon the death of the late curate or reader, vested in the Bishop of *Ely*, as bishop. And the determination of this question appears to us, to depend upon the consideration of two points; viz. First, whether, considering the nature and description of the right of the corporation as set out in the case, such right to nominate and appoint, falls within the 139th section of the 5 & 6 *W. 4. c. 76.*, or within 1 & 2 *Vict. c. 31.* For, if this right falls within the former act, there can be no doubt that the proviso for the interim appointment will govern the present case: but if, on the other hand, this right of nomination and appointment is not comprehended within the former act, but falls within the provisions of the latter, then arises the second ques-

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tion, whether the proviso contained in the 139th section of the 5 & 6 *W. 4.*, upon which alone the right of supplying the vacancy by the presentation or nomination of the bishop of the diocese, can be supported, extends or not to the present case.

And upon the first point, we are of opinion that the right of presentation or nomination in question clearly falls within the provisions contained in the 1 & 2 *Vict. c. 31.*, so as to make it unnecessary to consider whether such right does or does not fall within the 139th section of the former act.

That it was the intention of the legislature to take from municipal corporations, when established upon their new system, all ecclesiastical patronage of every kind and description, and to vest the same in the purchasers thereof, appears to be beyond a doubt. The general and comprehensive terms used in the former act, the passing of the second act in order to facilitate the sale of church patronage, which recites the doubt as to the church patronage therein described, and the terms in which such doubt is thereby removed; the entire absence of any supposable ground of distinction between one species of ecclesiastical patronage and another, in respect that some should be taken from them and others left; these circumstances all combine to prove the intention of the legislature to have been, the general removal of all ecclesiastical patronage from the hands of municipal corporations; and certainly the particular character and description of the patronage now under consideration, as claimed on the part of the corporation, assuming it to be correctly claimed, namely, the right of nominating a curate or reader, for a period as short and limited as they may think fit, with the power to remove him at their own pleasure, would not entitle it to any particular favour, as an exception from the general operation of the statutes.

But the question, whether the right of patronage claimed and exercised by the corporation of *Bury St. Edmunds*, does or does not fall within the operation of the statute 1 & 2 *Vict. c. 31.*, will best appear by comparing the description of the patronage contained in that act, with the facts stated in the case. The act recites, "that in some instances, the manors &c., whereof some municipal corporations are seised, were granted to them with an obligation to nominate, provide, and sustain in certain churches and chapels, able and fit priests, curates, preachers, or ministers, for the performance and administration of ecclesiastical duties and rites therein, and for the cure of the souls of the parishioners and inhabitants; and although such corporations have from time to time duly nominated and provided such priests, curates, preachers, or ministers, and paid stipends for their sustenance, and have either provided houses for their residence, or paid allowances in lieu thereof, yet such stipends or allowances have not been fixed or assured by any competent authority; and for want of any regular endowment or augmentation of any such curacies, they have not been perpetual cures, or benefices presentative, and the curates have not become bodies politic and corporate within the meaning of 1 *G. 1. c. 10.*, or 36 *G. 3. c. 3.*; by reason whereof doubts have arisen, whether the right of nominating ministers to such churches and chapelries can be sold under the provisions of the recited act." Now upon reference to the facts stated in the case, the right claimed and exercised by the corporation of *Bury St. Edmunds* appears to agree so closely with the recital of the act, that it might almost be supposed that the legislature had shaped the remedy with an express view to this particular case. For by the grant to the corporation of 6 *Jac. 1.*, the alderman and burgesses agreed to pay 8*l.* 10*s.* out of the tithes thereby granted to them, yearly to the use of the curates and ministers of the two parish

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churches of *Bury St. Edmunds*: and by the second grant of the 12 *Jac.* 1., the king, after stating his expectation that the alderman and burgesses of *Bury St. Edmunds* would provide able and fit ministers and preachers of the word, and other officers of the churches aforesaid necessary, at all times to come, granted to the alderman and burgesses, and their successors, the whole and entire rectories and vicarages of *Bury St. Edmunds*, and the said parish churches of *St. Mary* and *St. James*, and all rights and patronage of the same; and all the tithes both greater and less, and all other rights to the same belonging, to be held by them as freely and fully as the late abbot of the said monastery then lately dissolved, or any of his predecessors, had held the same. Now, under these grants, which were accepted by the corporation, there can be no doubt but that the corporation were bound to make a sufficient provision for the cure of the parish in question, and that they had the nomination and appointment of the person or persons who should perform the duty; nor is there any doubt that if they had appointed a person to such cure with a fixed stipend, and irremovable at their own pleasure, he would have been a perpetual curate in the strict legal sense of the word.

It appears, however, from the statement in the case, that they did not make any endowment, or give any fixed stipend to the ministers in either of the churches; nor did they, so far as appears in the case, for a considerable period subsequent to the grants of King *James*, appoint any one particular person to the cure of either of the churches; but from the year 1652 (the records previous to which year are lost), down to the year 1687, the alderman and burgesses from time to time appointed and provided the ministers necessary; during some part of that time, procuring, as they were best able, from *Sunday to Sunday*, clergymen from *Cambridge* or else-

where, and paying them for such their services. So that the corporation, during that early period, appear to have acted precisely in the same manner as the monastery itself before the dissolution had done, except that the corporation procured ministers from other other quarters instead of furnishing them out of their own body. Instances of which mode of nomination were probably not unfrequent at an early period after the dissolution of monasteries, as would appear from the case of *Carver v. Pinkney* (a), where a covenant is set out in a lease by the Dean of *Lincoln* of a certain rectory to the defendant, who covenants with the dean, "That he would find or provide a sufficient minister or priest to serve in the church, such as the dean and his successors should allow and approve, and would pay the said priest 40 marks per annum." So that the person or persons provided by the corporation to officiate in the cure of the parish at that time, appears to have been removable or changeable at their will, just as the monk sent to officiate by the monastery, was in some instances removable, "*ad nutum prioris*;" as appears in the case in *Cro. Jac.* 516. (b) And supposing such right of the corporation to appoint or present continued to be the same up to the time of the municipal corporation act, (which the counsel for the defendant contends to have been the case,) that is, if there was no fixed stipend payable by the corporation, and the corporation had the power to appoint and remove, the case would fall precisely within the words of the preamble of the statute of *Victoria*, — that tithes were granted to the corporation, with an obligation to nominate able and sufficient ministers; that ministers were nominated and provided by the corporation, and stipends paid by them; but the stipends not having been fixed, or allowed by competent au-

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thority, and for want of regular endowment or augmentation, the curacies have not become perpetual curacies; and the present case, therefore, would be precisely that which the statute intended to provide for.

Two objections have been urged on the behalf of the corporation, against the application of the statute to the case before us. In the first place, it is said there was nothing which could be the subject-matter of a sale within the intention of these acts; for there was no certain duration of incumbency in the cure, the appointment being entirely at the will of the corporation, who might displace one curate or reader and appoint another as they pleased. Admitting this power of motion to have existed in the corporation, for the purpose of argument, but not conceding it to be a fact in this case, when it appears that the curates have been regularly licensed by the bishop, the effect of which licence it is now unnecessary to enter into; admitting it, however, to exist, still it is difficult to feel the force of the objection. For the corporation are only required by the act to sell such right of nomination or presentation as they actually possess, without any reference to the period for which the nomination or presentation is given. If their right is, to present a curate who holds for life, they sell a power of presentation for life; if, a curate who is removable at will, such will be the presentation that is put up to sale.

It is objected in the second place, that the right of nomination exercised by the corporation in respect of the parish church of *St. James*, is not a nomination of *one* incumbent to the church, but of two separate and distinct ministers, viz. a curate or reader, and a preacher or lecturer, each, with a distinct and separate means of support provided for them, the curate, receiving the surplice fees, the preacher, having a salary paid to him by the corporation; and it is asserted that two benefices

in one and the same parish are unknown to the law of *England*, and cannot exist together. That there is not, however, any inconsistency in law in the proposition, that two benefices should exist in one and the same parish, is evident from the instance of parson and vicar, who may, under particular circumstances, both have the cure in the same parish, the parson, as it is said, *habitualiter*; the vicar, *actualiter* (see *Cro. Jac.* 517.); a proposition that is also adopted by the late Lord *Stowell* in his judgment in the case of the *Duke of Portland v. Bingham* (a). But, in fact, the objection is one that applies itself rather to the mode in which the ecclesiastical commissioners will deal with the right of patronage and direct the sale, than to the question now before us, which is confined to the right of the *ad interim* appointment; and so far as is necessary to the present inquiry, it is sufficient for us to say, that the office of curate or reader appears to us to fall within the scope and intention of the statute above referred to, of the 1 & 2 *Vict. c. 31*.

The second question, therefore, now arises, whether, the case falling within that statute, it is comprehended within the proviso of the 139th section of the former statute, so as to give the bishop of the diocese the power of appointing to a vacancy before the sale. And we think the necessary consequence of holding it within the statute of *Victoria* is to bring it within the 139th section of the municipal corporation act. And we consider the case of the same, as if the descriptive words of the later statute of *Victoria* had been actually inserted in the 139th section of the former act, and had formed

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(a) 1 *Hagg. Consist. Rep.* 162. And as to the diversity "inter advocatorem medietatis ecclesie et medietatem advocatioris ecclesie;" see *Co. Litt.*

17 b., 18 a.; see also *Holland's case*, 4 *Co. Rep.* 75.; *Smith's case*, 10 *Co. Rep.* 135.; *Windsor v. Archbishop of Canterbury*, *Cro. Eliz.* 686.

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part of that section. The doubt, expressed in the recital of the statute of 1 & 2 *Vict. c. 31.*, is, whether such rights of nomination as are therein described, could be sold under the provisions of the 139th section, one of which very provisions is, the power of interim appointment given to the bishop of the diocese. And when it is argued that by the express words of the statute of *Victoria*, the curacy does not become a benefice until after the sale, and that this appointment takes place before, it may be answered that the power of appointment in the 139th section is not limited to the case of benefices, but is extended also to the ecclesiastical preferments mentioned in that clause; and that the right of nomination to this curacy is, upon the argument, to be considered as virtually introduced into the clause itself by the latter statute.

For the reasons above given, we think that the right of appointment to the office of curate or reader of the parish church of *St. James in Bury St. Edmunds*, became vested in the Bishop of *Ely* upon the death of the late curate; and that judgment, *relictâ verificatione*, must, therefore, be entered for the plaintiff for the damages agreed upon between the parties.

Judgment for the plaintiff.

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EJECTMENT, on the joint demise of the three lessors of the plaintiff, to recover a freehold messuage, tenements, and lands at *Ireby*, in the parish of *Ireby*, in the county of *Cumberland*, in the possession of the defendant.

Pursuant to the provisions of the 3 & 4 W. 4. c. 42. s. 25., the following case was, by a judge's order, stated for the opinion of the court:

The premises sought to be recovered in this ejectment were formerly the property of *Thomas Walker* of *Ireby Low*, who died seised thereof in the year of our Lord 1813, having first made his will, bearing date on

A. by his will, after bequeathing certain pecuniary legacies to *C.* and *D.*, his son and daughter by a second marriage, and 100*l.* to his granddaughter *E.*, declared, "But if it should happen that my son *B.*

should marry and have heirs of his own, then my will is, that my executors shall pay unto *E.* the further sum of 100*l.* in addition to the 100*l.* before bequeathed to her, to be paid within twelve months after the birth of *B.*'s first child." And after giving certain specific legacies to *C.* and *D.*, he proceeded as follows: — "In case it should happen that *B.* (*A.*'s eldest son and heir at law), should depart this life and having no heirs lawfully begotten, and that my freehold tenement situate, &c. should fall by descent unto *E.*, and she inherit and possess the same; then my will is, that *E.* shall pay out of my said freehold tenement the sum of 400*l.*, viz. 200*l.* to *C.*, and 200*l.* to *D.*, the same to be paid within twelve months after *E.* comes into possession of the said estate;" adding a power of entry and sale in case of non-payment of the 400*l.*

Held, first, that the words "in case it should happen that my son *B.* should depart this life and having no heirs lawfully begotten, and that my freehold tenement should fall by descent unto *E.*," contemplated an indefinite failure of issue, from which an estate tail in *B.* might be implied.

But held, secondly, that the will contained no devise over to *E.* express or to be implied; so as to cut down the estate taken by *B.* the heir at law to an estate tail with remainder to *E.* in fee, though there were strong grounds for conjecturing that the testator intended *E.* to succeed to the estate in case his heir *B.* should die without issue.

In order to cut down interest of *B.* the heir to an estate tail, an express devise over is unnecessary, if the intention of the testator that the estate should go over in case *B.* the heir died without issue, is clearly manifested by the will.

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the 22d day of *July* 1809, and duly executed and attested to pass real estate, which will is as follows. : —

“ In the name of God, Amen. I *Thomas Walker* of *Ireby Low*, in the parish of *Ireby*, in the county of *Cumberland* yeoman, being advanced in years, but of sound and disposing mind, memory, and understanding, and considering the uncertainty of this mortal life, make and publish this my last will and testament in manner following, that is to say. First, I order and direct that all my just debts and funeral expenses shall be paid by my executors hereinafter named, as soon as conveniently may be after my decease. I give, devise, and bequeath unto my daughter *Grace Walker* 300*l.* of lawful money; I give, devise, and bequeath unto my son *Jonathan Walker* the sum of 250*l.* of lawful money; I also give, devise, and bequeath unto my granddaughter *Mary Walker* the sum of 100*l.* of lawful money. The above legacies to be paid by my executors twelve months after my decease. *But if it should happen that my son William Walker should marry or contract matrimony and have heirs of his own, then I order and direct, and my will is, that my executors shall pay or cause to be paid unto my granddaughter Mary Walker, the further sum of 100*l.* of lawful money more, in addition to the 100*l.* before bequeathed unto her, to be paid within twelve months after the birth of my son William's first child.* I give, devise, and bequeath unto my son *Jonathan Walker*, and my daughter *Grace Walker*, jointly and equally, share and share alike, all my shares, interest, title, and property arising, or that may arise out of the ship called or known by the name of the *Bell*, Captain *Carlisle* master, sailing out of the port of *Workington*, or some other *British* port adjoining. I give, devise, and bequeath unto my daughter *Grace Walker*, all my household furniture, such as beds, chairs, tables, clocks, and all and every other part called and known by the name of household furniture that is within my house or may be

contained within my dwelling-house at the time of my decease. *In case it should happen that my son William Walker should depart this life and having no heirs lawfully begotten, and that my freehold messuage and tenement situate at Ireby Low, and which I now live upon, should fall by descent unto my granddaughter Mary Walker, and she inherit and possess the same, then I order and direct, and my will is, that my granddaughter Mary Walker shall pay or cause to be paid out of my freehold messuage and tenement situate at Ireby Low 'aforesaid, the sum of 400*l.* of lawful money, viz., 200*l.* to my son Jonathan Walker, and 200*l.* unto my daughter Grace Walker, the same to be paid within twelve months after she, my granddaughter Mary Walker, comes into possession of the said estate: in case it should happen the 400*l.*, or any part, should be in arrear and not paid up at the above stated time, then it may be lawful for my son and daughter, Jonathan and Grace Walker, to re-enter and take into possession all my freehold messuage and tenement, and sell the whole, or any part, in public sale or sales, and continue to dispose of the same till all arrears and costs be paid up. And lastly, all the rest and residue of my goods and chattels, stock, and crop, standing and growing, and personal estates whatsoever or wheresoever, and of what nature or kind soever, I give unto my said sons William and Jonathan Walker; and I hereby make and ordain my sons William and Jonathan Walker sole and joint executors of this my last will and testament."*

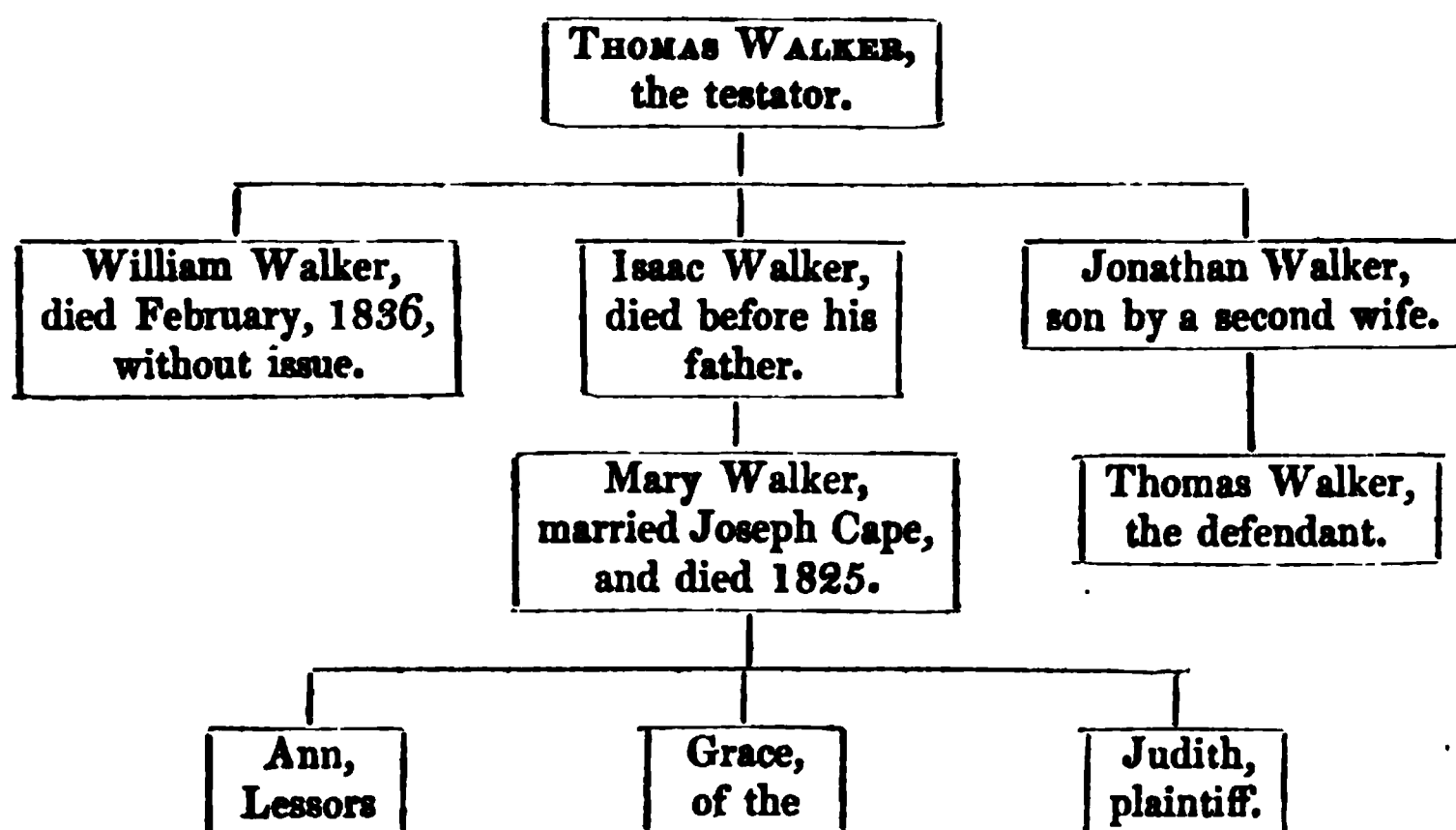
William Walker, the eldest son of the testator, *Thomas Walker*, survived his father, and enjoyed the said freehold messuage and tenement situate at *Ireby Low*, on which his father was living at the date of his will, (and which are the premises sought to be recovered in this ejectment,) and died in *February* 1836, unmarried and without issue, and without having levied any fine or suffered any recovery, and devised the said premises by

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1840. his will to his nephew *Thomas Walker*, the now defendant. The said *Mary Walker*, the granddaughter of the testator *Thomas Walker*, died in the year 1825, leaving three daughters (the lessors of the plaintiff) her surviving. The lessors of the plaintiff are joint heirs at law of *Thomas Walker*, the testator; as appears by the following pedigree: —

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The question for the opinion of the court is, whether the lessors of the plaintiff are entitled to recover. (a)

The case was first argued in *Hilary* term last, before *Bosanquet J.*, *Erskine J.*, and *Maule J.*; and again in *Trinity* term, before *Tindal C. J.*, and *Bosanquet, Erskine, and Maule JJ.*

(a) Points marked for argument on the part of the lessors of the plaintiff. — That by the will of *Thomas Walker*, *William Walker* took only an estate tail, with remainder to the testator's granddaughter *Mary Walker*, afterwards *Mary Cape*, in fee; or that there was an executory devise to the

granddaughter, in the event of the testator's son dying without issue of his body living at his decease.

For the defendant. — That *William Walker* had a devisable estate in the premises, and that they passed to the defendant under his will.

Hodgson, for the lessors of the plaintiff. Under this will the testator's granddaughter took an estate in fee, either in remainder after an estate tail in *William Walker* the eldest son, or by way of executory devise, in the event of *William* dying without issue living at his decease. Although the case is not free from difficulty, enough appears on the face of the will to satisfy the court that the testator intended his granddaughter to take in one or other of these ways. It is clear, that he contemplated her becoming the owner of the estate at some future period; for he directs her, when that shall happen, to pay 400*l.* to the children of the second marriage. It may be admitted, that the construction now contended for is a remote construction, and arises chiefly by implication; but the courts have always shown a desire to effectuate a testator's intention; and whether that is to be gathered from express words, or is to be implied, makes no difference, so long as the intention can be ascertained. In *Doe dem. Hickman v. Haslewood* (a), where a testator, after bequeathing his personal estate to his wife, proceeded as follows: "and I do likewise make my wife, the said *A. H.*, full and sole executrix of the freehold house situate, &c.," it was held that the wife took a fee in the house. Lord *Denman* C. J., in delivering the judgment says, "For what purpose, then, can we suppose that the house was introduced into the will at all? Why was it mentioned in immediate connection with property most certainly disposed of, if he meant to die intestate with respect to it? We can discover no other probable or reasonable supposition, but that the house was introduced into the will with the intention of disposing of it; and if so, there is no other conclusion possible, but that he meant the disposition to be in favour of his wife. We are aware of no authority (and none such has been suggested) which affects to impose

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(a) 6 *A. & E.* 167.; 1 *N. & P.* 352.

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a limit beyond which the courts shall not proceed in their favourable construction of wills, to carry into effect the intention of a testator." (a) So here, if this testator meant to die intestate with respect to this estate, for what purpose did he introduce his granddaughter's name into those parts of his will where the estate is mentioned? *Newton v. Barnardine* (b) closely resembles the present case. There, in debt for arrears of rent, the defendant pleaded that one *Cosham* was seised and had issue *Thomas, Richard, and Gilbert*. *Thomas* died, his wife *ensient*: the father devised, "to the child my son *Thomas's* wife now goeth withall, twenty nobles yearly, to be paid to the use of the child for twenty years, and if my son *Richard* die before he hath any issue of his body, so that my land do descend to *Gilbert* before he come to twenty-one years of age, then mine executors shall occupy it until *Gilbert* be twenty-one years of age." The father died: *Richard* entered: a daughter was born, who took to husband *Newton*, the plaintiff in that action, who entered and leased to the defendant, rendering the rent; and the defendant further said, that before the day of payment, *Richard* re-entered and ousted him by title; wherefore he prayed judgment if he ought to be charged with the rent. The plaintiff demurred to this plea; and after several arguments it was adjudged against the plaintiff; because *Richard*, by implication of the will, had an estate tail, as well by the words "if he die before he hath issue," as if they had been "if he die without issue," and therefore the entry of *Richard* was a lawful eviction of the term, and destroyed the rent. In *Cosen's* case (c) the facts are so similar, that it is probably the same case with a variation only in the names. In *Tilly v. Collyer* (d) one *Raven*, having issue three daughters, devised to his wife all his free-

(a) *Et vide antè*, 17. (d).

(b) *F. Moore*, 127.

(c) *Owen*, 29.

(d) 3 *Keb.* 589.

hold until his heir came to twenty-one, paying to the heir 10s. during the term, and to the rest, after fifteen years old, 20s. apiece, and the heir to pay to *A.* and *E.*, daughters, 100*l.* apiece, 40*l.* at the decease of the wife, &c., “and if *S.* my heir die without heir before twenty-one, that the lands descend and fall to *A.*, then *A.* to pay to *E.*,” &c. *Hale C.J.* “The testator was mistaken in his intent that the eldest daughter was his heir, but intended his land should go according to that mistake; also she that is called heir is to pay the portions to the younger, and no provision made for the elder daughter. * * * Albeit there is no express devise to *S.*, yet she being [named] his heir, this is sufficient to exclude the rest, and to make her sole heir.” So here, when this testator speaks of his granddaughter succeeding to the property on the death of *William*, he must be understood as intending to exclude any power in *William* to alienate it so as to prevent it falling to the granddaughter. In *Taylor v. Webb* (a) a devise in these words, “I do make my cozen *Giles Bridges* my solle ayeare and my yexecutor,” was held to give the devisee a fee. It was there said, by *Rolle C.J.*, “To make a construction of a will where the intent of the testator cannot be known, is *intentio cæca et sicca*: but here, although the words of the will be not proper, yet we may collect the testator’s meaning to be, by making of the party his heir, that he should have his lands, and it is all one as if he had said, heir of his lands; and, here, he not only makes him his heir, but his executor also, and, therefore, if he shall not have his lands, the word heir is merely nugatory and to no purpose; for, by being executor only, he shall have the goods; and, as it hath been observed, he is in this case *hæres factus*, though not *natus*.” And,

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(a) *Styles*, 301. 307. 319.; *S. C. nom. Marrett v. Sly*, 2 *Sid.* 75,

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by *Jerman J.*, “The word ‘heir’ implies two things: first, that he shall have the lands; secondly, that he shall have them in fee-simple.” These cases shew how the testator’s intention can be effectuated; and that is to be accomplished by holding that *William* took an estate tail. Another authority is to be found in *Walter v. Drew* (a), where, upon a devise, that if *William*, the eldest son of the testator, should happen to die without issue, then, and not otherwise, after *William*’s death, the estate was to go over to his son *Richard* and his heirs; it was held, that *William* took an estate tail by implication. So, in *Goodright dem. Goodridge v. Goodridge* (b), the testator, having devised his lands to his wife for life, proceeded, “if my son *R.* (who was the eldest), happen to die without heirs, then my son *J.* shall enjoy my lands;” it was held that *R.* took an estate tail; and that on his death without issue, and without having barred the estate tail, *J.* was entitled to recover the lands from *R.*’s devisee. In *Doe dem. Jones v. Owens* (c), where the testator devised to his wife his real estate for life, and then to be relinquished to his son *B. J.* at her decease; and his will and mind were, that if his son *B. J.* should die without issue, his real estate should go equally between his daughters *M.* and *S.* for the life of *M.*, and at her death the testator bequeathed the whole of his real estate to *S.* and her heirs: it was held that *B. J.* took an estate tail with remainder to *M.* and *S.* The argument on the other side will be, that the heir is not to be disinherited, except by express words or by necessary implication, according to the doctrine laid down in *Gardiner v. Sheldon*. (d) But in *Goodright dem. Goodridge v. Goodridge* (e), *Willes C. J.* expresses

(a) *Comyns*, 372.
 (b) *Willes*, 369.; 7 *Mod.*
 453.

(c) 1 *B. & Ad.* 318.
 (d) *Vaughan*, 259.
 (e) *Willes*, 372.

his opinion, that the rule laid down in that case in favour of an heir is carried too far. And see *Moone dem. Fagge v. Heaseman*. (a) It is submitted, however, that the inference to be drawn from the language used here amounts to a necessary implication. It may be said, that in order to support the construction now contended for, that a double implication will be requisite, but that is a fallacy; for the only implication is the devise to the granddaughter, of which the cutting down of *William's* estate to an estate tail is but the necessary consequence. The doctrine of implication has been carried very far in two modern cases. In *Tenny dem. Agar v. Agar* (b), under a devise of lands to the testator's son and his heirs for ever, as to part of the lands, upon condition that he should pay to the testator's daughter 12*l.* a year till she came of age, and then pay her 300*l.*, and in default of payment, that she should enter upon and enjoy the said part to her and her heirs for ever, and in case his *son and daughter* both died without *leaving* any child or *issue*, the testator devised the reversion and inheritance of all the lands to another; it was held that the devise over was not an executory devise, but a remainder limited after successive estates tail of the son, and also of the daughter, by implication. So in *Romilly v. James* (c), a devise to *H. S.*, my brother's son, to hold to him and his heirs, and in case my brother and his son should happen to die, having no issue of either of their bodies, then to *J. C.* and his heirs; was held to be, not a defeasible fee simple in *H. S.*, the son, with an executory devise over, but an estate tail. These two cases last cited go much further than is necessary to be contended for here. Apart from

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(a) *Willes*, 138. And as to this point, see 4 *Mann. & Ryl.* 71 (d); 5 *Nev. & M.* 287. 393.

(b) 12 *East*, 253.

(c) 6 *Taunt.* 263.; 1 *Marsh.* 600.

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authorities, the language of the will clearly shews that the testator intended, in the event of his son *William* dying without issue, that the granddaughter should take the estate. She is charged with the payment of the 400*l.*; and how is she to pay that charge if she is not to have the estate? The charge of itself would give her the fee; but besides that, the testator's intention is further indicated by the power subsequently given to the children of the second marriage, to enter and sell if the 400*l.* is not paid, who, if this construction be not adopted, will lose the benefit of that bequest.

Secondly, a different interpretation is given to the words "having" and "leaving" children; and in this case, if the words "having no heirs lawfully begotten," are to be considered as applying to the period of *William*'s decease, then the devise to the granddaughter must be held to be an executory devise. But the cases cited shew, that where a devise can take effect as a remainder, it is to be so construed. However, the words "having no heirs lawfully begotten," may, without much force, be held to mean, if *William* should die without having had a child born to him; and the court may so decide, if they think that the better construction.

Coote, for the defendant. It is submitted that the testator's will contains no devise of the estate in question, but that *William*, the eldest son, took it by descent as heir, charged in a certain event with the payment of 400*l.* to the children of the second marriage. Looking at the case in this point of view, will remove all difficulties, and will fully effectuate the testator's intention with respect to the whole of his family. At first it may be doubted whether the charge of 400*l.* could be maintained, were the court to hold that there was no devise of the estate; but, on consideration, it will be found that this doubt is

without any real foundation. Charging an estate devised to the heir at law with money to be paid to younger children, is not such an alteration of the estate as will make the heir take by purchase. For instance, in *Haynsworth v. Pretty* (a), where *P.*, seised of lands in fee, and having issue *R.*, *S.*, *J.*, and *M.* sons, and *N.* a daughter, devised to *S.*, *J.*, *M.*, and *N.* 20*l.*, to be paid to them when they attained to the age of twenty-one years; and devised all his lands to *R.*, his eldest son, to hold to him and his heirs, upon condition he should pay to his other children the said sums appointed unto them, according to the intent of his will; and if he refused payment of any of the said sum or sums of money, that then neither he nor his heirs should have or enjoy the said lands, any devise, title, descent, or interest, to the contrary notwithstanding; but that the said sons and daughters should have it to them and their heirs; it was held, that the first devise to the son and his heirs in fee, being no more than what the law gave, was void. (b) The question then arose as to what security the younger children had for their portions; and the case was again argued on that point (c), when it was held to be a devise to the younger children, on default of payment of their portions by the eldest son. That case will authorise the court to say here, that by the power given to the children of the second marriage to enter and sell in default of payment of the 400*l.*, the estate was devised to them in the event of such default. It may be admitted to be settled by the cases cited, that an *express* devise over on the failure of the issue of the heir to whom no estate is given by the will, cuts down his interest to an estate tail. But here, the devise over, instead of being express, is attempted to be raised by implication. Although the doctrine laid down in

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(a) *Cro. Elis.* 833. 919.;
F. Moore, 644.

(b) *Secus*, since 1 *Vict. c.* 26.
(c) *Cro. Elis.* 919.

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favour of the heir in *Gardiner v. Sheldon* (a) has been in some degree modified, that case is still a leading authority; and, as against the heir, the implication must be so strong as clearly to satisfy the court that such was the intention of the testator. In *Aspinal v. Petvin* (b), *Leach* V. C. said, "It has been argued, that it is now to be considered as the rule of construction, that if an estate be given, not to the heir, but to a stranger after the death of A., A. takes by implication. I cannot allow such a proposition to pass without entering my protest against it. I am not aware there is any authority to support it. If a testator gives to his heir after the death of A., he plainly means that his heir should not take during the life of A.; and having named no other person to take during the life of A., it is necessarily to be implied that he means A. to take during his own life. But if the testator gives to a stranger after the death of A., it does not plainly and necessarily appear from thence that he means that his heir should not take during the life of A.; and it is against the first principles of construction to disinherit an heir by conjecture." *Newton v. Barnardine* and *Cosen's* case are distinguishable from the present. There, in order to give any effect to the will, the court were obliged to hold that *Richard*, the testator's second son, took an estate tail. In *Tilley v. Collyer* the testator manifestly intended to make the eldest daughter his heir. In *Doe dem. Hickman v. Haslewood*, the court said that no other conclusion was possible but that the testator meant the disposition to be in favour of his wife. *Tenny dem. Agar v. Agar*, and *Romilly v. James*, have been cited as tending to shake the doctrine in *Gardiner v. Sheldon*. In the former case, however, the son had suffered a recovery, and it was therefore rather for his

(a) *Vaughan*, 259.(b) 1 *Sim. & Stu.* 544.

advantage to say that he took an estate tail; and in the latter case there was an express devise over.

The testator undoubtedly contemplated providing for all his family; but it would appear that the granddaughter was not so great a favourite with him as the rest; for, in the first instance, he only leaves her 100*l.*, and an additional 100*l.* afterwards.

Here it is submitted that no devise can be implied; but if the court think that there is a devise, then it is a gift of the estate to *William* in fee, with an executory devise over to the granddaughter, in the event of *William* dying without issue in the lifetime of the granddaughter. The testator seems to have intended the failure of issue to be while she was alive; and, if that be so, the event has not happened on which she was to have the estate. Furthermore, if the estate was to go over on the death of *William*, it was only in case he should die intestate, for the testator evidently contemplated that the estate should "fall by descent" to the granddaughter.

Hodgson, in reply. The main argument on the other side has been, that the granddaughter was to take only in the event of *William* dying in her lifetime and intestate. The objection to that construction is, that it imports into the will two conditions, without any reason or necessity. It is unquestionable, that by a will properly made, a charge might attach on an estate vesting in the heir by descent; but that is not the case here. If the testator contemplated an indefinite failure of *William's* issue, there would be no executory devise over, but the latter would take in tail, with remainder to the granddaughter in fee. It is said that the devise over must be express, in order to cut down the estate of the heir. It is true, that in the cases cited there was an express devise; but where the question is one of intention, it can make no difference whether that intention is

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— from the words used, so long as the inference is clear
and distinct. In *Goodright dem. Goodridge v. Goodridge* (a),
Doe dem. CAPE Willes C. J. says, “a distinction was endeavoured to
v. WALKER. be made by the counsel for the defendant, where there
is an express devise to the eldest son and his heirs in
the former part of the will, and where there is no such
devise; for in that case it was said that the eldest son
took a fee simple by descent, which could not be altered
or restrained by implication, and that as he claims
nothing by the will, he ought not to be affected by any
part of it. But this distinction has no foundation either
in reason or law. In reason it has none; for as every
tenant in fee simple has power to dispose of his estate
as he pleases, and the heir has no right but what is
controllable by his ancestor, so the only question is,
what the testator intended; and it is absurd to say
that it is more plain that he intended that his heir
should have a fee simple when he has given him no
such estate by his will, than when he had expressly
devised it to him and his heirs.” With respect to
Doe dem. Hickman v. Haslewood, all that the court
intended, by saying that no other construction was
possible, was that it was the probable and reasonable
intention of the testator to make a devise to his wife.
It is evident that this testator meant to provide for
all his family; but if the construction contended for
on the other side were to prevail, the granddaughter
would receive very little benefit under the will. It
is said, that she appears not to have been a favourite
with the testator, but the reason why he left her
only 100*l.* in the first instance, was that he contem-
plated the estate coming to her in the event of *William*
dying without issue. The only construction of the
will, which will give full effect to every part of it is,

(a) *Willes*, 371.

that *William* is to take an estate in tail, with a vested remainder to *Mary* in fee, charged with the payment of the 400*l.* to the children of the second marriage.

Cur. adv. vult.

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TINDAL C. J. now delivered the judgment of the court. The right of the lessors of the plaintiff to recover in this case depends entirely on the determination of the question, whether *Mary* their mother took an estate in fee simple in remainder under the will of *Thomas Walker*; for it is upon that supposition only that the three lessors of the plaintiff, who claim as the co-heirs of *Mary* their mother, can make out any title to the estate. For if *William* their uncle took any devisable estate, he devised it by his will away from them.

It is contended for the lessors of the plaintiff, that under the proper construction of this will, *William Walker*, the heir at law of the testator, took an estate tail by implication, and that *Mary*, the granddaughter of the testator, took a remainder in fee-simple dependent on such estate tail.

The case is one of undoubted difficulty, as is every case which depends on the construction of an informal will; and there exists besides the peculiar difficulty in this case, that there is no express devise in it, either to the heir at law or to *Mary* the granddaughter, but that the whole is left to implication only.

First, with respect to the estate taken by the heir at law, it must be premised, that, in order to ground the implication that he takes an estate tail, it must be held that there is a devise over to the testator's granddaughter *Mary*. Supposing, then, that an unequivocal devise over to *Mary* is to be found in the expressions of this will, it appears to be sufficiently clear, from the authorities cited at the bar, that the heir at law would,

1840. by implication, take an estate tail. (a) And in the present case it appears to be the necessary construction of the words of the devise, "that if my son *William Walker* should depart this life, and having no heirs lawfully begotten, and that my freehold messuage should fall by descent unto my granddaughter," that these words point at an indefinite failure of issue of his son, from which an estate tail might be implied.

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But the principal question in the case is this — does the will contain a devise over to *Mary* the granddaughter; and, if so, of what estate? An express devise to her in terms undoubtedly there is not; but an express devise is unnecessary, if the intention of the testator that the granddaughter should take is so clearly manifested by the will itself as to be equivalent to a direction to that effect. Some reliance has been placed on the mention of the granddaughter as the person next in succession to the son, as a circumstance, though certainly not a strong one, that she was intended to take. But further, the testator says, "in case my son shall depart this life and having no heirs lawfully begotten, and that my freehold messuage should fall by descent unto my granddaughter, and she inherit and possess the same; then I order and direct that my granddaughter shall pay out of the estate" certain sums. These are undoubtedly not proper words of devise, and the testator might be mistaken in supposing the land must necessarily come to the granddaughter by descent, which it would not if the heir at law disposed of the estate, either by devise or conveyance. But the authority of Lord *Hale*, in *Tilley v. Collier* (b), was cited, to shew that although the testator was mistaken, yet if he intended his land should go according to this

(a) See the cases collected in 2 *Powell on Devises*, by *Jarman*, 203.

(b) 3 *Keb.* 589.

mistake, the land should go accordingly, although the law did not so take it. It was further urged, that in a former part of his will the testator directs, "that in case his son shall have heirs of his own, then that his executors shall pay to his granddaughter *Mary* the farther sum of 100*l.*, in addition to the 100*l.* before bequeathed to her, to be paid within six months after the birth of his son's first child," thereby denoting a desire, or wish, that the land might become hers if the son had no children, and an anxiety to make provision for her, in case the estate should not be hers. And further, that he charges the land, "in case it should fall by descent to her, and she should inherit and possess the same, with the payment of 400*l.* to his son and daughter by his second wife." The state of the testator's family at the time of making his will was this: *William*, an elder son, *Mary*, a granddaughter, the representative of his second son, *Isaac*, and two children by a second marriage. Then, as the testator appears to have intended that the estate should descend to the issue of his eldest son, and, in that event, gave an additional legacy of 100*l.* to his granddaughter, representing, as she did, his second son; and as he charged the estate with 400*l.* in favour of the children of his second marriage, in case the estate should come into the possession of his said granddaughter, the child of his second son, it is said to be a fair presumption that he intended the granddaughter to take the land, subject to such charge. And if she took any thing, it is clear that he meant her to take the fee, the term "inherit" and fall by descent, implying a fee, and the power given to the children, in favour of whom the charges upon the land were made, to enter and sell in order to satisfy the charges, making it necessary that he should intend a fee.

All these circumstances have undoubtedly a strong

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tendency to shew that the testator contemplated the succession of *Mary* his grand-daughter to the estate, in case his eldest son should die without issue; and perhaps he meant that she should do so.

But the court cannot deprive the heir of his right to take the inheritance of his ancestor upon grounds of conjecture. Even supposing it were clearly shewn that *William* took only an estate tail, still the reversion dependent on the estate tail would descend upon him, and he might dispose of it by will, unless *Mary* took an estate in remainder by implication. Now the language of the will, respecting her interest in the estate, is conditional. "If it shall happen that *William* shall die without heirs of his body, and that the house shall fall by descent to *Mary*, and she shall inherit and possess the same." Whatever we may conjecture upon the subject, there will be no inconsistency with any other disposition of the will, if the words of this clause be construed in their grammatical and legal sense. The testator not having made any express disposition affecting the right of his heir at law, may, without imputing to him any intention contradictory to the rest of his will, have intended to direct that, if his heir at law should not exercise his power of disposing of the estate, in consequence of which the estate should *descend*, in the proper sense of the word, to *Mary*, (to whom it would rightfully descend in the absence of any disposition of it by *William*,) she should, out of the estate, pay certain legacies. We are bound to give effect to all the words of the will, if that can be done without violating any part of it; and also to construe technical words in their proper sense, where they can be so understood consistently with the context. Here, the estate would have descended upon *Mary*, the grand-daughter, but for the devise made by *William* in his lifetime, which has intercepted her right to the in-

heritance; and the condition, upon which the charge is made upon her to pay money out of the estate, has not been fulfilled.

In coming to this conclusion we have hesitated for some time, principally on account of a case which was said so closely to resemble the present, as necessarily to govern our decision. It is the case of *Newton v. Barnardine*, reported in *F. Moore (a)*, and shortly in *Owen (b)*, by the name of *Cosen's case*. That case was an action of debt for rent. The defendant pleaded that *Cosham* was seised, and had issue, *Thomas, Richard, and Gilbert*. *Thomas* died, his wife ensient. The father devised to "the child, the wife of my son *Thomas*, goeth withall" twenty nobles yearly, to be paid to the use of the child for twenty years; "and if my son *Richard* die before he hath any issue of his body, so that my land do descend to *Gilbert* before he come to twenty-one years of age, then mine executors shall occupy it till *Gilbert* be twenty-one years of age." The father died: *Richard* entered: a daughter was born, who married *Newton*, the plaintiff in the action, who entered and leased to the defendant, rendering rent: but the defendant shewed that before the day of payment, *Richard* re-entered and ousted him by title; whereupon he prayed judgment if he ought to be charged with the rent. *Newton*, the plaintiff, demurred to the plea. And, after several arguments, it was adjudged against the plaintiff, because *Richard*, by implication of the will, had an estate tail, as well by the words "if he die before he hath issue," as if it had been "if he die without issue:" and for this the entry of *Richard* was a lawful eviction of the term, and destroyed the rent. It will be observed that the contest in that case was, between the plaintiff, who claimed title by his wife, the posthumous

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(a) P. 127.

(b) P. 29.

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child of *Thomas*, and the lessee, who defended himself by the lawful eviction of *Richard* the second son. No express devise was made to *Richard*, nor was any express devise made to *Gilbert*, or to the executors; for the executors were not directed to occupy unless the land should descend to *Gilbert* before he came to twenty-one. The substantial question, therefore, was, whether *Richard* took any estate by the will to justify his entry and eviction of the lessee. As no express devise was made to him, the question necessarily was, whether the words "if he died without issue" were sufficient to raise an estate tail by implication. If he took such an estate under the will by implication, his preference to the heir at law appears to have been assumed. Whether the words "so that my land do descend to *Gilbert*," were sufficient to give him a remainder dependent on the estate tail of *Richard*, does not appear to have been particularly considered; but supposing the court to have thought that an estate tail to *Richard* could not be implied unless there were a devise over to *Gilbert*, or that the words in that case were sufficient to carry such a remainder by implication, it must be observed, that the word "descend" in that case could not be construed in its legal sense; for as *Gilbert* was the third son, and the testator contemplated the birth of a posthumous child of his eldest son *Thomas*, the estate upon the death of *Richard* without issue would not naturally descend to *Gilbert*. It was not, therefore, to be supposed, that the testator could have intended to use the word "descend" in its proper sense of the estate coming to *Gilbert* by inheritance.

Moreover, the language of the testator in *Newton v. Barnardine*, "if *Richard* die without issue, so that the land descend to *Gilbert*," much more strongly indicates his understanding that the succession of the second person

named would follow as a necessary consequence of the failure of the issue of the first, than the language in the present case, "that if it shall happen that *William* die without issue, and that the house shall fall by descent to *Mary*, and she inherit and possess the same."

We cannot, therefore, consider the case of *Newton v. Barnardine* as an authority, which compels the court to put a different construction upon the present will from that which the terms of it would, independently of the authority relied upon, appear to us to require. Here, the question is, not merely whether the words of the will are such as might warrant an implication of an estate tail in *William*, but whether a remainder to *Mary* is to be implied from terms of the will, which expressly speak of her taking by descent, and which may be satisfied, in their legal sense, without having such effect.

For these reasons, we are of opinion that judgment must be given for the defendant.

Judgment for the defendant.

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**CHARLES BARRETT v. The STOCKTON and
DARLINGTON Railway Company.**

Where the language of an act of parliament obtained by a company for imposing a rate or toll upon the public is ambiguous, or will admit of different meanings, that construction is to be adopted which is most favourable to the public.

Where, therefore, an act of parliament contained a clause authorising a railway company to demand a rate

not exceeding 4*d.* per mile upon all coals carried along the railway, and a subsequent clause directing that for all coals shipped for exportation a rate not exceeding $\frac{1}{2}$ *d.* per ton per mile should be charged; it was held that the second clause was to be read, as an exception engrafted upon the first; and also that coals shipped for *London*, were coals shipped for the purpose of exportation.

Where an act of parliament directed that a railway company should take a lower rate of tonnage upon goods conveyed by the railway and shipped in the port of *A.*, goods shipped at a place within the legal port of *A.*, but at some distance from the town of *A.*, were (under the circumstances) held to be entitled to the benefit of the reduction, though the act had previously spoken of "the port and town of *A.*"

ASSUMPSIT, for money received by the defendants for the use of the plaintiff, and on an account stated. Plea: non assumpsit.

This cause having been made a remanet from the sittings in *London* after *Trinity* term 1837, to the following *Michaelmas* term, was tried before *Vaughan J.*, when a special verdict was found, stating as follows:—

After the passing of a certain act of parliament in the 2 G. 4. (*a*), "for making and maintaining a railway or tram-road from the river *Tees* at *Stockton*, to *Witton Park Colliery*, with several branches therefrom, all in the county of *Durham*;" and of a certain other act of parliament made in the 4 G. 4. (*b*), "to enable the *Stockton and Darlington Railway Company* to vary and alter the line of their railway, and also the line or lines of some of the branches therefrom, and to make an additional branch therefrom, and for altering and enlarging the powers of the act passed for making and maintaining the said railway;" and of a certain other act of parliament made in the 5 G. 4. (*c*), "to authorise the com-

(*a*) 1 & 2 G. 4. c. xlv.

(*b*) c. xxxiii.

(*c*) c. xlviii.

pany of proprietors of the *Stockton and Darlington* Railway, to relinquish one of their branch railways, and to enable the said company to raise a further sum of money, and to enlarge the powers and provisions of the several acts relating to the said railway;" and of a certain other act of parliament made in the 9 G. 4. (a), "to enable the company of proprietors of the *Stockton and Darlington* Railway, to make a branch therefrom, in the counties of *Durham* and *York*, and to amend and enlarge the powers and provisions of the several acts relating thereto;" and in pursuance and under the authority of the said acts, or some or one of them, a railway has been constructed, called "The *Stockton and Darlington* Railway," and certain branch railways therefrom, and, amongst others, a branch to *Middlesbrough*, in the port of *Stockton-upon-Tees*, and terminating at and upon the river *Tees*, and certain inclined planes on the said railway and branches, and particularly a double inclined plane at *Brusselton*, and called "the *Brusselton* Inclined Plane;" which double inclined plane, consists of two inclined planes meeting at a point and declining therefrom, the one to the east and the other to the west; which railway, branches, and inclined planes, are the sole property of the defendants.

And that in pursuance, and under the authority, of subsequent acts of parliament, some or one of them, a certain other railway, called the "*Clarence* Railway," and certain branches therefrom, belonging to the company of the proprietors of the *Clarence* railway, have been made since the construction of the first-mentioned railway and the said branches thereof, which *Clarence* railway joins the *Stockton and Darlington* railway at *Sim Pasture*, and extends from thence to *Haverton Hill*, and thence, by a branch, to *Samphire Beacon*, and thence

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(a) c. lx.

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 Company.

to *Port Clarence*, upon the river *Tees*, and within the port of *Stockton-upon-Tees*.

And that the defendants have, from time to time, directed and appointed the several rates, tolls, inclined plane dues and duties, to be charged by them for the tonnage of all goods, wares, and merchandize, and other things carried or conveyed along the said railway and branches and inclined planes of the defendants. And that long before, and on the 1st day of *July* 1836, and from thence, until, and after the 1st day of *November* 1836, an account or list of the several rates of tonnage, inclined plane dues and duties, which the defendants had before then directed and appointed as aforesaid, was affixed and stuck up upon the several toll houses on the said railway of the defendants, and in other places, as required by the said acts of parliament.

And that, on divers days and times, between the said 1st day of *July* and the said 1st day of *November* 1836, the plaintiff sent, for the purpose of the same being shipped and conveyed as hereinafter mentioned, 10,000 tons of coals from the *Gordon* colliery, situate eight miles from *Sim Pasture* aforesaid; and also 6160 tons of coals from the *Norwood* colliery, situate nine miles from *Sim Pasture* aforesaid, along the defendants' railway unto, along, and over the said *Brusselton* inclined plane, and from thence along the defendants' railway to *Sim Pasture* aforesaid, and from *Sim Pasture* aforesaid, unto and along the said *Clarence* railway and branches thereof to *Port Clarence* aforesaid.

And that at the times the several parcels of coals were so sent and carried as aforesaid, the defendants had a toll house upon their said railway at *Sim Pasture* aforesaid, and that the said several parcels of coals were weighed at the said toll house by an agent of the defendants there, and on those several occasions the

servant of the plaintiff, who had the care of the waggons in which the said coals were respectively loaded, delivered to the said agent of the defendants attending there for that purpose at the said toll house, tickets in the form following:—*mutatis mutandis* as to date, name of pit, number of waggons, weight, &c. (that is to say),

No. 97.

October 27th, 1836.

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v.

The

STOCKTON and

DARLINGTON

Railway

Company.

Gordon Pit Export.

Return Ticket.

The railway company will deliver eight waggons of coals, as below, for export.

No.	Weight.	Description.	Destination.
47	55	Export Round By <i>Clarence</i> <i>Wm. Lishman</i> Agent	To <i>Ralph Darling</i> .
257	55		
37	54		
130	56		
313	57		
89	55		
275	56		
124	54		
		22-2	

The weight columns being filled up at the said toll house, and all the said tickets being signed by *William Lishman*, who was an agent of the plaintiff, acting at the said *Gordon* colliery, but not the servant of the plaintiff who delivered the said tickets as aforesaid. That at the time the tickets were so delivered as aforesaid to the agent of the defendants, he told the person who delivered the same that the defendants considered that they had no control over the coals when they left their railway at *Sim Pasture* aforesaid, and that the defendants would require the plaintiff to pay for the transit of the said coals according to the usual tonnage rate charged by the defendants for coals carried from *Sim Pasture*

1840. aforesaid, along the defendants' railway and the branches
 ——— thereof, for consumption within the limits of the port of
BARRETT *Stockton-upon-Tees* aforesaid.
 v.
 The And that the plaintiff, in pursuance of the purpose
STOCKTON and aforesaid, shipped the said parcels of coals on board of
DARLINGTON vessels lying at *Port Clarence* aforesaid, *within the port*
 Railway *of Stockton-upon-Tees* aforesaid, for the port of *London*,
 Company. in that part of the United Kingdom called *England*, for
 consumption there; and that the said coals, being so
 shipped as aforesaid, were afterwards, and before the
 several demands and payments hereinafter mentioned,
 carried and conveyed by the said vessels, from *Port*
 Clarence aforesaid, and for consumption there.

And that on divers days and times between the said
 1st day of *July* and the said 1st day of *November* 1836,
 the plaintiff sent, for the purpose of the same being
 shipped and conveyed as hereinafter mentioned, 400
 tons of coals from the said *Norwood* colliery along the
 defendants' railway, unto and along and over the said
Brusselton inclined plane, and from thence along the
 defendants' railway and the *Middlesbrough* branch
 thereof, to *Middlesbrough* aforesaid; and that at the
 times the several last-mentioned coals were so sent and
 carried as aforesaid, the defendants had a toll house
 upon their said railway near the junction of the said
 railways at *Sim Pasture* aforesaid; and that the said
 several parcels of coals last aforesaid were weighed at
 the said toll house by an agent of the defendants there,
 and on those several occasions the servant of the plain-
 tiff who had the care of the waggons in which the said
 last-mentioned coals were respectively loaded, delivered
 to the said agent of the defendants attending there for
 that purpose at the said toll house, tickets in the form
 following: —

(*Mutatis mutandis* as to date, name of pit, number of
 waggons, &c.), that is to say,

“ No. 1.

July 1st, 1836.

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“ *Gordon Wallsend Coals.*

“ The railway company will deliver to Mr. *Ralph Darling, Middlesbrough*, eight waggons of coals, as below, for export.

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Railway
Company.

	69	
	183	
	204	
<i>Wm. Lishman,</i>	66	
Agent.	250	
	265	
	0	
	0	

All the said tickets being signed by *William Lishman*, who was an agent of the plaintiff, acting at the said *Gordon* colliery, but not the servant of the plaintiff who delivered the tickets as last aforesaid.

That the plaintiff, in pursuance of the said purpose, shipped the several last-mentioned parcels of coals on board of vessels lying at *Middlesbrough* aforesaid, for the port of *London* aforesaid, for consumption there, and that the said last-mentioned coals, being so shipped as last aforesaid, were, afterwards, and before the several demands and payments hereinafter mentioned, carried and conveyed by the said last-mentioned vessels, from *Middlesbrough* aforesaid to *London* aforesaid, for consumption there. And that for, and in respect of, the coals so conveyed to, and shipped at, *Port Clarence*, as hereinbefore mentioned, the defendants demanded, and required the plaintiff to pay, tonnage for the transit of such coals along the said railway of the defendants to *Sim Pasture* aforesaid, at and after the rate of 1½d. per ton per mile, being the usual tonnage rate charged by the defendants for coals carried from *Sim Pasture* aforesaid, along the defendants' railway, and the branches thereof for consumption within the limits of the port of *Stockton-upon-Tees* aforesaid, in the whole amounting

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to 987*l.* 11*s.* 8*d.*, and also the additional duty or sum of 6*d.* per ton, upon the same coals, for and in respect of the said transit or passage thereof over the said *Brusselton* inclined plane as aforesaid, in the whole amounting to 404*l.* And that for, and in respect of, the said coals so conveyed to and shipped at *Middlesbrough* as aforesaid, the defendants demanded, and required the plaintiff to pay, tonnage for the transit of such last-mentioned coals along the said railway of the defendants to *Middlesbrough* aforesaid, at the rate of one halfpenny per ton per mile, and also the additional duty or sum of 6*d.* per ton upon the last-mentioned coals, for and in respect of the transit or passage thereof over the said *Brusselton* inclined plane as aforesaid, which last-mentioned additional duty amounts in the whole to 20*l.*; all such charges and demands for tonnage and inclined plane dues and duties so made and demanded as hereinbefore mentioned, being, respectively, according to the rates, tolls, inclined plane dues, and duties, so directed, appointed, affixed, and stuck up, as aforesaid. And that after the said demands, the said several sums of 987*l.* 11*s.* 8*d.*, 404*l.*, and 20*l.* were respectively paid by the plaintiff to the defendants, and that the same sums were, and each of them was so paid by the plaintiff to avoid a distress and under protest, and after the sum of 282*l.* 3*s.* 4*d.* (being at the rate of one halfpenny per ton per mile, for the tonnage of the several quantities of coals carried and conveyed by the defendants to *Sim Pasture* as aforesaid, and thence carried along the *Clarence* railway and branches thereof to *Port Clarence*, and there shipped as aforesaid, had been tendered by the plaintiff and refused by the defendants, and that the said several sums were so paid by the plaintiff under an agreement with the defendants, that the plaintiff should be entitled to recover back the whole or any part of the said several sums so paid by him to the defendants as

aforesaid, by the within mentioned suit, if the same were not legally due when so paid as aforesaid (a). And that no part of the said coals so carried and conveyed from the said *Gordon* and *Norwood* collieries to *Sim Pasture* and *Middlesbrough* respectively, was carried or conveyed over any inclined plane belonging to the defendants except the said *Brusselton* inclined plane, and that *Middlesbrough* and *Port Clarence* are on opposite banks on the river *Tees*, at the distance of one mile from each other, and nearly equally distant from the mouth of the said river, and that the distance from *Sim Pasture* to *Stockton* by the defendants' railway is seventeen miles and a quarter, and from *Stockton* to *Middlesbrough* by the defendants' railway is four miles, and from *Sim Pasture* to *Middlesbrough* by the defendants' railway (avoiding *Stockton*) is twenty miles and a half, and that the distance from *Sim Pasture* to *Port Clarence*, by the *Clarence* railway, is sixteen miles. And that the only place for the shipment of coals carried along the defendants' railway, as constructed under their first act, was *Stockton-upon-Tees*, within the port of *Stockton-upon-Tees*, and that at the times when the said several coals were so carried and conveyed as aforesaid, the only places for the shipment of coals carried down defendants' railway, and the branches thereof from *Sim Pasture* below the junction of the *Clarence* railway, and the defendants' railway, were *Stockton-upon-Tees* and *Middlesbrough*. And that until the construction of the defendants' railway, coals were not shipped for sale in the said port of *Stockton-upon-Tees*. That the defendants have no property in, or control over, the *Clarence* railway, or *Port Clarence*; and that *Port Clarence* and all the staiths, buildings, and places for the shipment of coals there, and all the lands immediately surrounding the same, are

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(a) And see *Lindon v. Hooper*, 1 Esp. N. P. C. 84.; *Brown v. Cowp.* 414.; *Knibbs v. Hall*, *M'Kinally*, ib. 279.

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the sole property of the *Clarence* Railway Company. That ever since the construction of the *Clarence* railway, coals gotten from various other pits, and conveyed upon the *Clarence* railway, and not upon any part of the defendants' railway, have been and are shipped at *Port Clarence*; and that about a quarter of a mile from *Port Clarence* on the opposite side of the river, is a place called *Cargo Fleet*, for the landing of coals and other merchandize.

And that before the passing of the said act of 2 G. 4. (a), there was no railway from which coals could be shipped at the port of *Stockton-upon-Tees*, or along which coals could be carried for exportation there; and that *Hartlepool* and *Seaham*, where there are harbours and staiths, and places for the shipment of coal, made and erected subsequently to the construction of the defendants' said railway and branches, are respectively within the port of *Stockton-upon-Tees*, *Hartlepool* being twelve miles, and *Seaham* twenty-two miles, from the town of *Stockton-upon-Tees*; but that coals passing along the defendants' railway and branches or any part thereof, are not shipped at either of those places.

And upon the whole matters aforesaid, found with respect to the said issue joined between the parties aforesaid, the jurors aforesaid are altogether ignorant, how far or for whom the said issue ought to be found, and thereupon they pray the advice of the court of our Lady the Queen of the Common Pleas at *Westminster*.

And if, upon the whole matters aforesaid, it shall seem to the said court, that the defendants were not, during all the time aforesaid, legally entitled to charge for the tonnage of the said coals carried and conveyed along the railway of the defendants to *Sim Pasture*, and thence, along the *Clarence* railway, to *Port Clarence* within the port of *Stockton-upon-Tees*; and there shipped

(a) 1 & 2 G. 4. c. xlv.; *suprà*, 138.

and conveyed to the port of *London*, for consumption there, more than after the rate of one halfpenny per ton per mile, then the jurors say that the plaintiff is entitled to recover back, and receive from, the defendants the sum of 705*l.* 8*s.* 4*d.* being after the rate of 1½*d.* per ton per mile by the defendants' overcharged, for and in respect of the tonnage of the coals so carried and conveyed for the purpose of being shipped, as last aforesaid.

But, if it shall seem to the said court that the defendants were, during all the time aforesaid, legally entitled to charge more than a halfpenny per ton per mile, for and in respect of the tonnage of such coals, then the jurors say that the plaintiff is not entitled to recover back, or receive any thing, from the defendants in respect of their said charge for the tonnage of coals so carried and conveyed for the purpose of being shipped as last aforesaid.

And if it shall seem to the said court that the defendants were not, during all the time aforesaid, legally entitled to charge, upon the said coals carried and conveyed along the railway of the defendants to *Sim Pasture*, and thence, along the *Clarence* railway, to *Port Clarence* within the port of *Stockton-upon-Tees*, and there shipped for, and conveyed to, the port of *London* for consumption there, an additional charge of 6*d.* per ton over and above the tonnage, for every ton of such coals passing the *Brusselton* inclined plane, then the plaintiff is entitled to recover back, and receive, from the defendants the further sum of 404*l.* in respect of such additional charge for the passage of the said coals over the *Brusselton* inclined plane for the purpose of being shipped as last aforesaid.

But if it shall seem to the said court, that the defendants were, during all the time aforesaid, legally entitled to make the last-mentioned additional charge of 6*d.* per ton for such coals passing the *Brusselton* inclined plane,

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for the purpose of being shipped as last aforesaid, then the plaintiff is not entitled to recover back, or receive, any thing from the defendants in respect of such additional charge as last aforesaid.

And if it shall seem to the said court that the defendants were not, during all the time aforesaid, legally entitled to charge upon the said coals carried and conveyed by the defendants along the defendants' railway, and the branches thereof, to *Middlesbrough* aforesaid, and there shipped for, and conveyed to, the port of *London* for consumption there, an additional charge of 6*d.* per ton, over and above the tonnage, for every ton of such coals passing the *Brusselton* inclined plane, for the purpose of being shipped as last aforesaid, then the plaintiff is entitled to recover back, and receive, from the defendants, the further sum of 20*l.* in respect of such additional charge for the passage of the said coals over the *Brusselton* inclined plane, for the purpose of being shipped as last aforesaid.

But if it shall seem to the said court that the defendants were, during all the time aforesaid, legally entitled to make the said additional charge of 6*d.* per ton for such coals passing the *Brusselton* inclined plane, for the purpose of being shipped as last aforesaid, then the plaintiff is not entitled to recover back, or receive, any thing from the defendants in respect of such additional charge as last aforesaid.

And if, upon the whole matters aforesaid, it shall seem to the said court that the said issue within joined between the parties aforesaid or any part thereof, ought to be found for the plaintiff, then the jurors aforesaid, upon their oath aforesaid, do find the same, and assess the damages accordingly, for the plaintiff, in such manner as the said court shall think the same ought to be found upon the whole of the matters aforesaid.

And if, upon the whole of the matters aforesaid, it shall seem to the said court that the said issue within

joined between the parties aforesaid, or any part thereof, ought to be found for the defendants, then the jurors aforesaid do find the same accordingly for the defendants, in such manner as the court shall think the same ought to be found upon the whole of the matters aforesaid.

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Wilde, Solicitor-General, (with whom were *Stephen Serjt.*, *Wightman*, and *Fitzherbert*,) for the plaintiff.

The first question for the consideration of the court is, what construction is to be put upon the words "shipped for exportation," which are found in the first *Stockton and Darlington* railway act of 1 & 2 G. 4. (a)

(a) 1 & 2 G. 4. c. xlv. s. 62.

"And in consideration of the great charge and expense which the said company of proprietors must incur and sustain in making and maintaining the said railways or tram-roads and other the works hereby authorised to be made and maintained, Be it further enacted, that it shall and may be lawful for the said company of proprietors, from time to time, and at all times hereafter, to ask, recover, and receive to and for the use and benefit of the said company of proprietors, for the tonnage of all goods, wares, and merchandize, and other things which shall be carried or conveyed upon the said railways or tram-roads, or upon any part thereof, the rates, tolls, and duties hereinafter mentioned, that is to say:

For all limestone, materials for the repair of turnpike roads or highways, and all dung, compost, and all sorts of manure, except lime, which shall be carried or conveyed upon the said railways or tram-roads,

such sum as the said company of proprietors shall from time to time direct or appoint, not exceeding the sum of 4*d.* per ton per mile.

"For all coal, coke, culm, cinders, stone, marl, sand, lime, clay, ironstone, bricks, tiles, slates, and all grass and unmanufactured articles, and building materials, such sum as the said company of proprietors shall from time to time direct and appoint, not exceeding the sum of 4*d.* per ton per mile.

"For all lead in pigs or sheets, bar-iron, waggon-tire, timber, staves, and deals, and all other goods, commodities, wares, and merchandizes, such sum as the said company of proprietors shall from time to time direct and appoint, not exceeding the sum of 6*d.* per ton per mile.

"For all articles, matters, and things for which a tonnage is *hereinbefore* directed to be paid which shall pass the inclined planes upon the said railways or tram-roads, such sum as the said company of proprietors

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The defendants will say that exportation means a carrying to foreign parts, or to parts beyond the seas. But regard must be had to the intention of the legislature.

The terms export and import are used in various senses according to the subject matter.

Now this act relates to the port of *Stockton-upon-Tees*.

There is no reason why coals sent across the North Sea to *Hamburg* should pay a lower rate of tonnage than coals sent to *London*. It was not the object of the legislature to promote the sending of coals into foreign countries. Exportation is discouraged by duties, not fostered by bounties. The word "exportation" in the act is to be construed most strongly against the company, and most favourably for the public. The company are not at liberty to introduce into these acts of parliament words which have a double meaning, and then to seek to impose higher burthens upon the public than were contemplated. Many acts of parliament may be referred to, in which the terms export and exportation, and import and importation, are used without reference to the conveying of goods and from to a foreign country. By 6 & 7 W. 3. c. 18., a duty is imposed upon coal and culm laid on board any ship or vessel to be carried, *imported*, or brought, or which shall be carried, *imported* or brought in any ship or vessel into any port or place in the kingdom of *England*, dominion of *Wales*, or town of *Berwick-upon-Tweed*, from any port or place within the said kingdom, dominion, or town of *Berwick-upon-Tweed*, or from the kingdom of *Scotland*. And by the twenty-fourth section of that statute, if any of the

shall appoint, not exceeding the sum of 1s. per ton.

"And for all coal which shall be shipped on board of any vessel or vessels in the port of *Stockton-upon-Tees* aforesaid,

for the purpose of *exportation*, such sum as the said company of proprietors shall appoint, not exceeding the sum of $\frac{1}{4}$ d. per ton per mile."

coals or culm for which the duty thereby granted had been paid or secured at the importation thereof, be again *exported* to any other place in this kingdom, or to any parts beyond the sea, then the said duty shall be wholly repaid. So the 9 & 10 *W. 3. c. 13. s. 9.* speaks of the importation and exportation of coals, from one port or place in the kingdom to another, and in the 6 *G. 4. c. 107. s. 122.* as importation or exportation, whether inward, outward, or coastwise. In 5 *G. 1. c. 9. s. 1.*; and in 5 *G. 3. c. 35.* these words are used with reference to the coasting trade. Exportation is always *expressed* to be to foreign countries when it is so meant. [*Maule J.* Does the term mean any thing more than sending goods out of the *port*?] The effect of the construction contended for on the part of the defendants would be to make it cheaper to use the defendants' railway than to go by the *Clarence* Railway for nothing. By the 10 *G. 4. c. cvi.*, all coal, culm, coke, cinders, and other articles, shipped on board any vessel in the river *Tees*, and entered at the custom-house of the port of *Stockton-upon-Tees*, are to be deemed and taken to be *for exportation* under the therein recited act of 9 *G. 4. c. lx.* and that act. Thus the defendants themselves, in putting a construction upon their own act 9 *G. 4. c. lx.* (which passed on the same day as the *Clarence* Railway Act 9 *G. 4. c. lxi.*), have declared that the term exportation is to be understood in its larger sense. According to the construction for which the defendants contend, the coal-owners will have to pay three times as much if they use the *Clarence* Railway, than they will if they come all the way by the defendants' railway; and yet the preamble of the *Clarence* Railway, to which, as the two railways communicate with each other, the defendants must have been consenting parties, sets forth the great advantages to result to the public from the use of the then projected *Clarence* Railway.

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Secondly, it will be contended on the part of the defendants, that supposing that coals sent to *London* are coals exported within the meaning of the act, yet the coals in question are not to be considered as exported, because such coals left the defendants' railway at *Sim Pasture*. It is not easy to understand why this circumstance should be made a ground for demanding the higher rate of tonnage. At the time the payment was made these coals had been actually exported, and were in *London*. If the defendants have omitted to provide themselves with a sufficient establishment to enable them to obtain the full amount of the tonnage which they are authorised to receive, that is a fact which cannot affect the right of the plaintiff. No specific place for unloading the coals is contemplated in the statute, because the party sending them is required to give notice at what point he will unload. (a) A power is given to unload at discretion at

(a) By the seventieth section of the act 1 & 2 G. 4. c. xlv. s. 70. it is enacted as follows:—
 “And for better ascertaining and more easily collecting the said rates, tolls, and duties, Be it further enacted, that the owner or owners or person or persons having the care of any waggon or other carriage passing upon the said railways or tram-roads, or any part thereof, shall give an exact and true account in writing, signed by him or them, to the collectors of the said rates and tolls at the place or places where they shall attend for that purpose, of what quantity of goods and other things as aforesaid shall be in such waggon or other carriage, from whence brought, and where the same are intended to be unloaded or left; and in case any person shall neglect or refuse to give such

account or to produce his bill of lading to any collector demanding the same, or shall give a false account, or shall deliver any part of his lading or goods at any other place than what is or are mentioned in such account, with an intent to avoid the payment of the said rates, tolls, and duties, or any part of them, he shall forfeit and pay any sum not exceeding 10s. for every ton of goods and other things, and so in proportion for any less quantity than a ton which shall be in such waggon or other carriage of which such account shall be so refused to be given, or which shall be fraudulently delivered out as aforesaid, as the case shall happen to be over and above the respective rates, tolls, and duties directed to be paid for the same by virtue hereof.”

any part of the whole line, as appears by the provision made, in the eighty-seventh section, for lords of manors. (a)

The third point is, whether *Port Clarence* is within the port of *Stockton-upon-Tees*. *Port Clarence* is recognised by the legislature as a proper shipping place within the port of *Stockton-upon-Tees*, and if within the port, the language of the last clause of the sixty-second section is clear and unambiguous. But, if there were any doubt, the higher rate ought not to be demanded, because in order to entitle the company to such a demand, there should be a clear intention on the part of the legislature to impose the charge.

The fourth point is, whether supposing coals sent to *London* to come within the denomination of coals exported, and supposing an exportation from *Port Clarence* to be an exportation from the port of *Stockton-upon-Tees*, the coal so exported is liable to the charge of 6*d.* per ton, for the use of the *Brusselton* inclined plane. The defendants are bound to shew a clear intention on the part of the legislature to subject coals so exported to that charge. But the apparent intention was to exempt all such coals from every other duty upon payment of $\frac{1}{2}$ *d.* per ton per mile; and the question is, whether that exemption can be taken away by implication as contended. Upon this part of the special verdict the question is, whether the plaintiff is chargeable for the use of the intended plane. The latter part of the sixty-second section directs, that the rates, tolls, and duties payable to the defendants on *all* coal shipped for exportation, shall not exceed one halfpenny per ton per mile, without any distinction in respect of coals using the inclined plane. [*Tindal* C. J. You say that the clause at the end of the sixty-second section amounts to a virtual exemption of coals shipped for

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exportation from the payment of the inclined plane toll.] It is a clear rule, that one section is not to be considered as repealing or destroying another, if it be possible that they can be so construed that both may stand together. The rule for construing apparently conflicting provisions in a statute is laid down in *Stevens v. Duckworth* (a), by *Atkyns B.* (b) If the second clause of the sixty-second section be read thus, “4*d.* for all coals not exported,” the tolls imposed in respect of the inclined plane would not apply to that which was before excepted. The words “for which a tonnage is hereinbefore directed to be paid,” would be useless, if the same inclined plane tonnage was to be paid on all coals, whether mentioned before or after. The word “hereinbefore” cannot be rejected; there is no instance of the rejection of words which occur in an act of parliament, for the purpose of raising a charge upon the subject by implication. The plaintiff is not to be affected by the indirect operation of words introduced incidentally into the defendants’ act of parliament; it was their duty to frame their act so as to be free from ambiguity, a duty which will be performed so long only as courts of justice hold a strict hand over such statutes. The twenty-first section of 4 G. 4. c. xxxiii. (c) recites a

(a) *Hardres*, 338.

(b) *Ibid.* 343, 344.

(c) 4 G. 4. c. xxxiii. s. 21.
 “And whereas by the said recited act” [1 & 2 G. 4. c. xlv. called defendants’ first act]
 “the said company of proprietors were authorised and empowered from time to time and at all times thereafter, to ask, demand, sue for, recover, and receive for the tonnage of all articles, matters, and things for which a tonnage duty is thereby directed to be paid, which shall pass the inclined planes upon

the said railways or tram-roads such sum as the said company of proprietors should appoint, not exceeding the sum of 1*s.* per ton: And whereas at the time of the passing of the said recited act it was understood and considered that one inclined plane only would be necessary upon the said railways or tram-roads thereby authorised to be made, but, inasmuch as by reason of the deviations and alterations hereby authorised to be made, and by which it appears the length of the said railways

section in a former act in a more limited sense than that in which the legislature had used the term "all coals" in the former act; whilst it professes to recite the former section, it omits most material words which occur in that section, which operate by way of exception. It is clear that it also omits all notice of subsequent provisions. The terms of the former section are recited in a sense which does not belong to them, when the whole of that section is read together. No doubt a variety of questions might be raised by the ingenuity of counsel upon the construction of acts of this description, and a decision in favour of the defendants would hold out a bounty upon the framing of doubtful acts of parliament. It is recited "that it was so understood and considered;" by whom it was so understood and considered we are not told. This uncertain language, under which the plaintiff, a stranger, is sought to be charged, would be bad even in an affidavit. It is submitted that the effect of the first act is to subject parties *not exporting*, to the payment of 1s. per ton for the use of the *one* inclined plane; 1s. is given for the use of each of the inclined planes under the second act. There is no foundation for the supposition that it

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or tram-roads will be shortened three miles or thereabouts, a greater number of inclined planes will be requisite; Be it therefore enacted, That it shall and may be lawful to and for the said company of proprietors, from time to time and at all times hereafter, to ask, demand, take, recover, and receive, to and for the use and benefit of the said company of proprietors, for all articles, matters, and things which shall pass one or more of the inclined plane or inclined planes upon the said

railway or tram-roads, such sum as the said company of proprietors shall appoint, not exceeding the like rate or sum of 1s. per ton, for and in respect of each of the said inclined planes, over and above and in addition to the rates, tolls, and duties by the said recited act and this act imposed, or authorised to be taken and received, for goods, wares, merchandize, and other things which shall be carried or conveyed upon the said railways or tram-roads, or any part thereof."

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was intended by the second act to extend the liability to pay the 1s. per ton for the use of the inclined plane to coals which were not liable to that burthen under the former act; the words "all coals" in the recital in the second act must be taken to be used in the same qualified sense, and subject to the same exception, as in the former act. The defendants must contend that these words introduce, argumentatively and incidentally, a new charge in respect of the inclined plane. In *Gildart v. Gladstone* (a), Lord *Ellenborough*, in delivering the judgment of the court, says (b), "If the words would fairly admit of different meanings, it would be right to adopt that which would be most favourable to the interest of the public, and most against that of the company; because the company, in bargaining with the public, ought to take care to express distinctly what payments they were to receive, and because the public ought not to be charged, unless it be clear that it was so intended." So in *Scales v. Pickering* (c), *Best* C. J. says (d), "they who enter in such cases, must clearly shew their authority; and if the words of the statute on which they rely be ambiguous, every presumption is to be made against the company and in favour of private property. If such a construction were not adopted, acts would be framed ambiguously in order to lull parties into security." So in *Niblett v. Pottow* (e), *Tindal* C. J. says (g), "It is sufficient to look at this act and apply a plain understanding to it, always remembering that we are not affirmatively to impose a toll, unless the language of the legislature be clear." That construction which is consistent is to be preferred to that which is repugnant. If the acts be read in the mode contended for by the plain-

(a) 11 <i>East</i> , 675.	(d) 4 <i>Bingh.</i> 452.
(b) <i>Ibid.</i> 685.	(e) 1 <i>New Cases</i> , 81.; 4
(c) 4 <i>Bingh.</i> 448.; 1 <i>Moore</i>	<i>Moore & Scott</i> , 595.
& <i>P.</i> 195.	(g) 1 <i>New Cases</i> , 86. . . .

tiff, all may stand together. In the first act, the expression all coals means all coals not shipped for exportation, and the second act should be read with the same qualification.

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Channell Serjt. (with whom were *Addison* and *Smythe*), for the defendants. The first question raised by the special verdict depends upon the construction of the sixty-second section of the defendants' act, 1 & 2 G. 4. c. xliv. If that section had stopped at the end of the fourth branch, there would not have been any dispute, as the defendants charge a lower rate of tonnage than that which they are there authorized to receive. The doubt arises upon the fifth or concluding branch of the section. The plaintiff must contend that this fifth branch operates by way of proviso or by way of exception; but it is submitted that it operates in neither of those ways. That clause gives something cumulative upon that which was given by the third branch. The judgment of the court will proceed upon the legal construction of the several enactments; it would not be affected by the acts of the company, even if those acts were more clearly before the court. It has been asked on the other side, why a bonus should be given if the coals are for home consumption. Suppose the company to say we will have something extra, but limited in amount, say a halfpenny per ton per mile upon coals for exportation. This is preferable to a construction which would give discretion to the extent of 4*d.* in one case, and limit the defendants to a halfpenny the other. [*Tindal* C. J. Are not acts which give cumulative remedies against the public so expressed; as in the stamp acts?] This is not in the nature of an act imposing a tax upon the public. It is not to be construed like stamp acts, or like turnpike acts. Neither can it be compared to acts relating to the forming of public docks, which parties

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trading within a certain district are *compelled* to use. [*Tindal* C.J. That is so with respect to the *Southampton Docks*.] And, until lately, as to the *West India Docks*.

The railway is private property, and its user on the part of the public must be voluntary. [*Bosanquet* J. It became the defendants' property under compulsory powers enabling them to take land the property of others.] In some cases an enactment is confessedly cumulative without any express words to make it so. That is evidently the case with respect to the fourth clause of the sixty-second section; which, if the enactment is not construed to be cumulative, would be unreasonable; and it is submitted that the same construction is to be put upon the fifth clause as upon the fourth. It is expressly found by the jury, that, until the construction of the defendants' railway, coals were not shipped for sale in the port of *Stockton-upon-Tees*. This act, therefore, whether it is to be understood in one sense or the other, has created the export trade.

Secondly, there was here no exportation within the meaning of the sixty-second section. In *Bennett v. Daniel(a)*, *Parke* J. says, "It is a safe rule of construction to take words in their plain and ordinary sense, unless a different intention can clearly be collected from the other parts of an act of parliament." (b) So, in *The King v. Pease(c)*, the same learned judge says, "We are to construe provisions in acts of parliament according to the ordinary sense of the words, unless such construction would lead to some unreasonable result, or be inconsistent with or contrary to the declared or implied intention of the framers of the law, in which case the grammatical sense of the words may be extended or modified." Statutes have been referred to, in which the

(a) 10 B. & C. 500. ; 5 M.
 & R. 441.

(b) 10 B. & C. 506.

(c) 1 Nev. & Mann. 690.

words import and export are said to be used with reference to the removal of goods from one port in *Great Britain* to another. It is not denied that the words *may* have that meaning when required by the context. Thus, where the words are brought, *imported*, and carried, the sense in which the word "imported" is used is pointed out by the words with which it is surrounded. So where the legislator speaks of the importation of coal into the city of *London* by inland navigation or coastwise, the introduction of the latter words necessarily qualifies the meaning of the term "importation." But in 1 & 2 G. 4. c. xliv. s. 62., there is nothing to denote that the word "exportation" is used in any other sense than that in which it is ordinarily understood, namely, that of sending by sea to a foreign port. (a)

There must also be an exportation from the port of *Stockton-upon-Tees* to bring the case within the words of the statute. *Port Clarence* is, no doubt, within the legal port of *Stockton-upon-Tees*, and in that sense the port of *Stockton-upon-Tees* is spoken of in the special verdict; but looking at the provisions of 1 & 2 G. 4. c. xliv., the term will appear to be used in its popular

(a) On the contrary, exportation, in its original signification, means nothing more than carrying out, and *portus* is derived by *Calvin* (*Lex. in verbo*), from *porto*, as being the place where goods are exported and imported. In *Justin.* (XI. 15.), we find "*Darium...vehiculoexportatum*,"—in *Plautus* (*Truc. I. 2.*) "*Qui (the thief) manus gravidas foras exportet*;"—in *Varro*, "*Taurus, qui, exportavit, per mare e Phœnice, Europam.*" (*Rei Rust. II. 5.*)

Portus has been attempted to be traced to *πορθμός*, a ferry. If any etymological connection

exist between the two words, it would rather seem to be that both, and perhaps also *porta*, may be derived from *πόρος*, a transit or passage, *pore*.

The meaning of the term "exportation" will, it is conceived, depend upon the termini, expressed or implied. — Thus, when the legislature of the United Kingdom speaks of exportation, without saying from what place, the entire kingdom, which is the subject of legislation, will be the *terminus a quo*, and some foreign country or countries must be the *terminus in quem*:

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1840. sense, as signifying the harbour and port connected
 — with the town of *Stockton-upon-Tees*. In the *Hull Dock*
 BARRETT . *Company v. Browne* (a), the question was, whether the
 v. 14 G. 3. c. 56., which gave (s. 42.) the plaintiffs a ton-
 The nage on ships coming into or going out of the harbour
 STOCKTON and of *Kingston-upon-Hull*, and a certain basin or docks
 DARLINGTON within the port of *Kingston-upon-Hull*, or unlading or
 Railway lading any of their cargoes within the said port, ex-
 Company. tended (b) to goods loaded at *Goole*, in the river *Ouse*,
 which is, for revenue purposes, within the legal port
 of *Kingston-upon-Hull*. Lord *Tenterden*, in delivering
 the judgment of the court in that case, says, “ It ap-
 pears impossible to say that the second member of the
 sentence of general enactment, as to vessels unlading or
 lading within *the said port*, can be understood in any
 different or more enlarged sense than the prior member
 of the same sentence, to which it so manifestly refers,
 and which mentions vessels coming into or going out of
 the said harbour, basin, or docks, within the *port* of
Kingston-upon-Hull; and the articles specifying the
 particular rates must be understood in the same manner.
 And if we refer to the title and all the precedent parts
 of the act for the interpretation of this forty-second sec-
 tion, as the word of reference ‘ the said ’ requires us to
 do, we shall certainly find nothing to give a more ex-
 tensive sense to the name or phrase, ‘ the port of *King-*
ston-upon-Hull,’ than its local and popular sense, and
 much wherein it is evidently limited to that sense.”

That the word port is in this case to be understood in
 its more limited sense, appears; first, from the state of
 things which existed previous to the act; secondly, from
 the language of the preamble; thirdly, from other clauses
 in this act and in other acts.

Upon the first point, it is said in *Bacon's Abridgment*,

(a) 2 B. & Adol. 43.

(b) *Ibid.*

Statute (I. 5.), such construction ought to be put upon a statute as may answer the intention of the makers, to be ascertained by reference to the cause of the passing of the act.

Upon the second point, as to the preamble, it is said, *Co. Litt.* 79. a., "The rehearsal or preamble of the statute is a good mean to find out the meaning of the statute, and, as it were, a key to open the understanding thereof:" upon which Mr. *Hargrave* has the following note, "Lord *Coke's* manner of expressing himself on the operation of the preamble in the construction of statutes, is very observable. Instead of saying, generally, that the preamble should control the enacting clauses, or of limiting precisely how far it shall have that effect, which would have been attempting to make a line where one cannot be drawn, he cautiously says that it is a good mean to find out the intention." In *Crespigny v. Wittenoom* (a), *Grose J.* says, "Though the preamble cannot control the enacting clause, we may compare it with the rest of the act, in order to collect the intention of the legislature." In *Mason v. Armitage* (b), Lord *Erskine C.* lays down the same rule; and in *Halton v. Cove* (c), Lord *Tenterden* says (d), "On a sound construction of every act of parliament, I take it, the words in the enacting part must be confined to that which is the plain object and general intention of the legislature in passing the act, and that the preamble affords a good clue to discover what that object was." Now here, in the sixty-second section, the words are, "and for all coals which shall be shipped on board of any vessel or vessels in the port of *Stockton-upon-Tees* aforesaid,"—that is, in the said port of *Stockton-upon-Tees*, which must mean some port before referred to, and there is no previous refer-

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(a) 4 T. R. 790. 793.

(b) 13 Ves. 25. 35.

(c) 1 B. & Adol. 538.

(d) Ibid. 558.

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ence to any port except in the preamble; by which it appears that the object of that act was, the making of a railway from the river *Tees*, at or near *Stockton*, to *Witton Park* colliery, with five branches respectively, one of which, it is to be observed, has the one terminus at *Darlington*, and the other at *Stockton*. The preamble then recites, that the railway and branches will be of great public utility, by facilitating the conveyance of coal, &c., from the interior of the county of *Durham* to the town of *Darlington*, and to the said town and port of *Stockton*, and also the conveyance of merchandize from the said town and port of *Stockton* to the said town of *Darlington*, and into the interior of the said county of *Durham*: It is found by the special verdict, that until the construction of the defendants' railway, coals were not shipped for sale in the said port of *Stockton-upon-Tees*, and that there was no railway from which coals could be shipped at the port of *Stockton-upon-Tees* aforesaid, or along which coals could be carried for exportation there. From the facts so found, and the manner in which the words "town and port of *Stockton-upon-Tees*" are used in the preamble, it may be inferred that the words "in the port of *Stockton-upon-Tees* aforesaid," are used in the popular and limited sense.

Thirdly, with respect to the light afforded for the construction of the sixty-second section of the first act by other clauses, it may be observed that the language of the fifth (a), the eighty-seventh (b), and the eighty-

(a) "Provided always, that the company shall have full liberty and power to purchase any parcel or parcels of land not exceeding five acres in the whole, for the purpose of making a wharf or wharfs."

(b) "That it shall be law-

ful for the lord or lords, lady or ladies of any manor or manors, and the owner or owners of such lands or grounds near to, through, or by which the said railways or tram-roads or any part thereof shall be made, to erect and use any wharfs, land-

eighth (a) sections of that act is inappropriate, if the term, part of *Stockton-upon-Tees*, be taken in its extended sense. The plaintiff, after being obliged to contend, in

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ing-places, cranes, weighing-beams, or warehouses, in or upon his, her, or their respective wastes, lands, or grounds, adjoining or near to the said railways or tram-roads, or any of them, and to land any goods or other things upon such wharfs, or landing-places, or upon the banks lying between the same, and the said railways or tram-roads, or any part thereof; and also to make and use proper and convenient places for waggons, carts, and other carriages, to lie, and turn in, and pass each other, so that the making or using thereof do not obstruct or prejudice the passage of the said railways or tram-roads, and that all rates or tolls which shall be paid for the use of such wharfs, landing-places, cranes, weighing-beams, and warehouses respectively, shall be, and the same are hereby accordingly vested, in the lord or lords, lady or ladies of such manors, or the owner or owners of such lands or grounds who shall make and erect the same as aforesaid, and his, her, or their representatives, so that the rates and powers therein granted to the said company of proprietors, be not thereby reduced, altered, or infringed."

(a) "That if any such lord, &c. shall not, within the space of three calendar months next after notice given in writing to him, her, or them, or left at his, her, or their last or usual

place or places of abode, by or on behalf of the said company of proprietors, signifying that any part of such waste, lands, or grounds is necessary or proper to be used by them for the purpose of erecting and making wharfs, landing-places, warehouses, and buildings, for the use of the said railways or tram-roads, or for making or laying out necessary and convenient roads for conveyance of goods to and from the said railways or tram-roads, make, erect, and lay out, and from time to time maintain and keep in good and substantial repair, such proper and sufficient wharfs, or landing-places, warehouses, buildings, and roads, for the use of the said railways or tram-roads, as any two or more justices of the peace for the said county of *Durham*, shall think necessary, on the respective part or parts of the waste lands and grounds described in such notice, then, and in every or any such case, the said company of proprietors shall have full power and authority without any hinderance or restraint whatsoever, to make use of such waste lands or grounds, not being the ground whereon any house or other building stands, or a garden, orchard, yard, park, planted walk, or an avenue to a house; (except as hereinbefore is mentioned or referred to), for erecting and building sufficient wharfs, &c. and making and laying out necessary

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support of one part of his case, that coals for exportation are liable only to the payment of $\frac{1}{2}d.$ per ton, whilst other coals are open to a charge of $4d.$, insists that exported coals are exempt from the inclined plane duty, leaving all other coals subject also to this additional burthen. According to the construction contended for, coals for exportation, already so highly favoured as to be chargeable only with $\frac{1}{2}d.$ instead of $4d.$ per ton, are to be further advantaged by a total exemption from the inclined plane duty. This argument is founded upon the use of the word "hereinbefore," which occurs in the fourth clause of the sixty-second section. But the previous clauses of the section speak of all coal carried upon the railway, without any restriction. The fifth clause can, at the most, only be considered as an exception out of the coals mentioned in that clause, leaving the fourth clause to operate as well upon those coals which are within, as upon those which are without, the exception contained in such fifth clause. But if any doubt should be thought to exist upon the construction of this section in the first act, the twenty-first section of 4 G. 4. c. xxxiii. (a) makes it clear that the 1s. per ton may be demanded *in addition* to the tolls imposed by the former act. Supposing it may have happened, that in the hurry in which such acts of parliament are prepared, or from confusion in introducing new clauses, the fourth and fifth sections had become transposed, any little doubt or ambiguity which the unskilful collocation of the clauses of the sixty-second section of the first act may have occasioned is removed by the explicit and distinct language of the twenty-first section of the second act.

and convenient roads to and from the said railways or tram-

roads, agreeably to such notice to be delivered as aforesaid."

(a) *Suprà*, p. 150.

Wilde Solicitor-General, in reply. The defendants are driven to the argument that they never understood their own acts. If the term "export" is sometimes used in acts of parliament in one sense and sometimes in another, the court will not construe the clause in question in favour of those who affect such ambiguous language. As there was no export trade from *Stockton* previously to the passing of 1 & 2 G. 4. c. xliv., it is not improbable that the bill, as originally drawn, contained no reference to exports. It was, in all probability, represented by the owners of collieries that, in order to make the railroad beneficial to them, according to the terms of the preamble, it was necessary that their coal should be transmitted to *Stockton* at such low rate of tonnage as would enable them to compete in the *London* market with coals coming from other districts. It would be a fraud upon the coal-owners, whose opposition had been silenced by the proposed bonus, could the defendants turn round upon them and demand a toll which would render the working of their mines for the *London* market unprofitable, and therefore impracticable. In this view of the case, the fifth clause would probably be added during the discussion in parliament. The term "exportation," used in the statute, is to be taken, as against this company, in its largest sense. The last of the defendants' acts passed in *May* 1828; and in the twenty-eighth section of that act the charge of 1½*d.* is introduced by way of exception. Why should the increased expense incurred by the defendants in making the inclined plane upon the railway, entitle them to charge persons for the *Brusselton* inclined plane who were before exempt from such payment? The case of the *Hull Dock Company v. Brown* merely decides that services performed in one part of a port should not bring a charge upon other parts of the port to which the consideration did not apply.

Cur. adv. vult.

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TINDAL C. J. now delivered the judgment of the court. Upon this special verdict two questions are raised: first, whether the plaintiff's coal, — which was carried along the company's railway as far as *Sim Pasture*, and from thence along the *Clarence* railway as far as *Port Clarence*, and there shipped for *London*, — is liable to the higher duty of $1\frac{3}{4}d.$ per ton per mile, as claimed by the defendants, or to the lower duty of only one halfpenny per ton per mile; secondly, admitting the shipment of the coal to have been for the purpose of exportation within the meaning of the statute, whether the plaintiff's coal is liable to pay the duty of $6d.$ per ton for passing the *Brusselton* inclined plane, in addition to the railway duty.

Upon the first question two points have been made on the part of the company; first, that the lower toll, which is imposed by the last branch of the sixty-second on "coal shipped on board of any vessel in the port of *Stockton-upon-Tees* for the purpose of exportation," is a cumulative and additional toll, over and above the larger toll imposed by the second branch of that section upon "*all coal*" carried along the railway; secondly, that, if such smaller toll be not cumulative, yet, at all events, a shipping for *London* is not a shipping for the purpose of exportation, within the meaning of the act, so as to bring the coal in question within the lower rate of tonnage.

Upon the first point, we think the proper construction of the sixty-second section is, that the latter branch of that section excepts the coal therein described, out of the operation of the general words of the former branch, and imposes a lower duty thereon *in lieu* of the higher duty. By the former branch, "*all coal*," generally carried on the railway, is made liable to the higher duty per ton per mile; by the latter, all coal shipped for the purpose of exportation is made liable

to a payment "not exceeding one halfpenny per ton per mile;" and it appears scarcely conceivable that the legislature should not have declared explicitly that this latter payment was to be taken "over and above the former," if such had been its intention; or that it should have been provided, by an express enactment, that the coal shipped for the purpose of exportation, should be liable to a payment "not exceeding one halfpenny per ton per mile," if it still continued liable to pay a higher rate of duty under a former provision of the act.

A second, and more important, point raised on the part of the defendants, depends entirely on the proper interpretation of the terms "shipping for the purpose of exportation;" that is, whether those words are satisfied by a shipment for carrying out of the port to any other port or place in *England*, or whether they must be construed to mean, and be confined to, a shipment for carrying out of the port of *Stockton-upon-Tees* to ports or places in foreign countries.

That the legislature has, upon various occasions, used the word "exportation" in a sense less extensive than the exporting of commodities to foreign ports or places, and in the more restrained sense of carrying commodities from one port to another within the kingdom, is abundantly evident from the statutes referred to in the course of the argument; and that the word "exportation," when used in this very statute, was intended by the legislature to comprise within it this more restricted sense, appears by no means improbable, when the twenty-eighth section of 9 G. 4. c. lx., which was passed for making an additional branch to the *Stockton and Darlington* railway, is carefully compared with the sixtieth section of 9 G. 4. c. lxi., which was passed for the original formation of the *Clarence* Railway Company, explained as it is by the thirty-seventh section of 10 G. 4.

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c. cvi., passed for the amendment of the last-mentioned act. The two acts passed in 9 G. 4. *c. lx.* and *lxi.*, received the royal assent on the same day; the subject-matter of both is closely connected together, for the *Clarence* railway communicates with, and enters into, the *Stockton* and *Darlington* railway at *Sim Pasture Farm*; and the sections therein above referred to are those which impose the duties for carrying goods along each respective railway. The duty imposed by the *Stockton* and *Darlington* railway act, s. 28., is in these terms:—“On all coal, &c. carried upon the new branch railway, and which shall be shipped on board of any vessel in the river *Tees* for the purpose of exportation,” a lower duty; and “for all coal which shall not be shipped for exportation” a higher duty. The *Clarence* railway act imposes also a lower duty “on all coal carried on the said railway for exportation,” and a higher duty on “all coal carried upon the said railway for home consumption.” Now, it is obvious that the terms “coal shipped for exportation,” in the first act, and “coal for exportation,” in the second, must mean one and the same thing: and, when we find in the 10 G. 4. *c. cvi.*, which is an act for enabling the *Clarence* Railway Company to vary their line, and for altering, amending, and enlarging their powers, that the legislature, in the thirty-seventh section, has enacted, that “all coal which shall be shipped on board any vessel in the river *Tees*, and entered at the custom-house of the port of *Stockton-upon-Tees*, shall be deemed and taken to be for exportation under the said recited act and this act,” it appears a reasonable inference that the legislature intended the same thing by the words “shipped on board vessels for the purpose of exportation” in the second *Stockton* and *Darlington* railway act.

But it appears to us to be sufficient for the determination of the present point, if the word is only am-

biguous in its meaning; for, in that case, the general principle laid down by Lord *Ellenborough* in his judgment in *Gildart v. Gladstone* (a), (an action for *Liverpool* dock dues,) will govern this case. Lord *Ellenborough* there says: "If the words would fairly admit of different meanings, it would be right to adopt that which is more favourable to the interest of the public and against that of the company; because the company, in bargaining with the public, ought to take care to express distinctly what payments they are to receive (b), and because the public ought not to be charged unless it be clear that it was so intended." Again, in the case of *The Dock Company at Kingston-upon-Hull v. Browne* (c), Lord *Tenterden* says: "These taxes are a rate upon the subject; and it is a sound general rule, that a tax shall not be considered to be imposed (or, at least, not for the benefit of a subject) without a plain declaration of the intent of the legislature to impose it." See also the opinion of *Bayley J.* in *The Company of Proprietors of the Leeds and Liverpool Canal v. Hustler* (d); and the opinion of *Holroyd J.* in *Britain v. The Cromford Canal Company* (e), to the same effect.

We therefore think the just construction of the sixty-second section is, that the coal in question must be considered as coal shipped for exportation, and consequently liable to the lower duty only.

The second question raised upon this record is, whether the coal so carried on the railway for exportation, is liable to the payment of the toll for passing the inclined plane; which question also depends on the proper interpretation of the same sixty-second section. And we think the intention of the legislature is suffi-

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(a) 1 *East*, 675.(b) *Ib.* 685.(c) 2 *B. & Ad.* 58.(d) 1 *B. & C.* 424.; 2 *D. & R.* 556.(e) 3 *B. & Ald.* 141.

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ciently clear, that the coal in question is liable to that payment.

The duty payable for the carriage of coal on the railway, whether for the purpose of exportation or not, although it varies in amount, is a duty of so much "per ton per mile." The duty payable in respect of passing the inclined plane is a duty of so much "per ton," without reference to distance. It is a duty, therefore, of a character perfectly different from the former, to be super-added to the distance-duty if the coal passes over the inclined plane. And, when the statute enacts that "all the articles, matters, and things for which a tonnage is *hereinbefore* directed to be paid" shall be liable to the duty for passing the inclined plane, we think *all* coals are included; (for that is the language of the next preceding paragraph), and that the words are large enough to include coal intended for exportation, which is afterwards made liable to the lower duty: and, indeed, the proper mode of reading the section is, to incorporate the last paragraph as an exception to be engrafted on the former more general one, which allows 4*d.* per ton per mile to be taken; as if that paragraph had been followed by such words as these — "except coals shipped for exportation, for which the company may take such sum as they shall appoint, not exceeding one halfpenny per ton per mile."

We therefore think the amount of the duty to be taken should be calculated upon the principles above laid down; and that the verdict should be entered for the difference between that amount and the sum demanded by the defendants, and received by them, under protest, from the plaintiff.

Judgment for the plaintiff accordingly.

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DEBT (*a*), on a bill of exchange, dated 28th of November 1889, drawn by the plaintiff upon the defendant for 25*l.* 10*s.* 3*d.*, payable to the plaintiff or his order, sixteen days after date, for value received *to Michaelmas last* (*b*), with a second count for money due upon an account stated.

Plea to the first count, that before the plaintiff drew, or the defendant accepted, the bill therein mentioned, the defendant, by the sufferance and permission of the plaintiff, held and occupied a certain messuage and dwelling-house, with the appurtenances, of the plaintiff, at and under a certain rent therefore payable by the defendant to the plaintiff in respect thereof; and that the plaintiff drew, and the defendant accepted, the said bill for and on account of and in payment by anticipation (amongst other considerations) of a certain part, to wit, the sum of 12*l.* 10*s.* of the said rent, which was not then, at the time of the drawing and accepting of the said bill, due from the defendant to the plaintiff; and the defendant avers that, before he, the plaintiff, drew the

In debt by the drawer and payee of a bill of exchange for 25*l.* 10*s.* 3*d.*, drawn in November "for value received to Michaelmas last," the defendant pleaded that before the acceptance, he held a messuage, &c., as tenant to the plaintiff, at a certain rent, and that the bill was drawn and accepted in payment by anticipation, amongst other considera-

tions, of 12*l.* 10*s.*, part of the said rent not then due, and that before the drawing and acceptance of the bill, the plaintiff assigned the messuage to *J. S.*, of which the defendant had no notice until after such drawing and acceptance; that after the bill became due, and before the commencement of the suit, *J. S.* gave notice of the assignment to the defendant, and required and received the 12*l.* 10*s.* rent from him; and that, therefore, the consideration of the acceptance as respected the 12*l.* 10*s.* wholly failed:

Held (after the plaintiff had pleaded over, viz. upon demurrer to the replication), that the plea was bad, on the ground that it answered only *part* of the consideration, though pleaded to the count on the bill generally, and that fraud (which was not alleged) was not necessarily to be inferred from the statement in the plea.

(*a*) *Vide* *Priddy v. Henry*, 1 *B. & C.* 674.; 3 *D. & B.* 165. (*b*) *Highmore v. Primrose*, 5 *M. & S.* 65.; 1 *B. & C.* 675.

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said bill, and before the defendant's acceptance thereof, to wit, on the 1st day of *October* 1839, the plaintiff assigned the said messuage and dwelling-house, with the appurtenances, unto one *William Bradshaw*; of which assignment the defendant had not at the time of the drawing and accepting of the said bill any notice; and that afterwards, and after the said bill became due, and before the commencement of this suit, to wit, on the 19th day of *December* 1839, the said *William Bradshaw* gave notice to the defendant of the said assignment to him the said *William Bradshaw* of the said messuage and dwelling-house, with the appurtenances, and then required the defendant to pay to him the sum of 12*l.* 10*s.* so as aforesaid due from the defendant for the said rent, to the said *William Bradshaw*; and the defendant thereupon paid to the said *William Bradshaw* the said sum of 12*l.* 10*s.*, and for which the said bill was so drawn and accepted, and thereupon the consideration of the defendant's acceptance of the said bill as respects the said sum of 12*l.* 10*s.*, wholly failed. Verification. To the residue of the declaration the defendant pleaded *nunquam indebitatus*.

Replication, to the first plea, *de injuriâ*; to the second plea, the *similiter*.

Demurrer to the replication to the first plea, shewing for cause, — that the said replication is improper, inasmuch as in the first plea the defendant derives inchoate authority from the plaintiff, and such plea does not amount to matter of excuse, in which case only a replication *de injuriâ* is by the rules of pleading applicable; that the said first plea derives authority from the plaintiff in the following manner, — that in the said first plea it is stated, that the bill was drawn by the plaintiff and accepted by the defendant, for, and on account of, and in payment by anticipation (amongst other considerations) of, a certain part, to wit, 12*l.* 10*s.* of certain rent, which

was not, at the time of the drawing and accepting of the said bill, due from the defendant for the use and occupation by the defendant of a certain messuage and dwelling-house, with the appurtenances of and belonging to plaintiff; and the said first plea then goes on to state, that before the defendant's acceptance of the said bill, the plaintiff assigned the said messuage and dwelling-house, &c. unto one *William Bradshaw*; and that afterwards and after the said bill had become due, the said *William Bradshaw* gave notice to the defendant of the said assignment, and then required the defendant to pay to him the said sum of 12*l.* 10*s.* so due from the defendant for the said rent; and that the defendant thereupon paid to the said *William Bradshaw* the said sum of 12*l.* 10*s.* so due for the said rent, and for which the said bill was drawn and accepted; that therefore by the said first plea it appears that the defendant, by and through means of an authority directly derived from the plaintiff, paid the said rent to the said *William Bradshaw*, which authority, that is to say, the fact of the said assignment, should have been directly denied by a traverse. And that also it appears by the said plea that the defendant in his own right, claims some interest in or out of the subject-matter of the action, inasmuch as at the time the defendant was liable to pay the said rent to the plaintiff, the plaintiff assigned the said premises to the said *W. Bradshaw*, and the said *W. Bradshaw* became and was entitled to receive the said rent from the defendant, for which the said bill was drawn; and therefore if the said plea be true, the consideration of the said bill being shewn to have altogether failed, the same ought to have been given up to the defendant, and therefore the plea does in effect claim an interest in the subject-matter of the action, to wit, the said bill, and in such case *de injuriâ* cannot by the rules of pleading be replied to the plea. And also for that the said first plea is in the

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nature of an accord and a satisfaction, and therefore admits a breach of the contract in the said first count mentioned, and avers satisfaction thereof by subsequent matter, and is not in the nature of an excuse for the non-performance of any breach of the said contract in the said first count of the said declaration mentioned; and for that the said first plea, not being in the nature of an excuse, the plaintiff should have directly and simply traversed one of the matters stated in such first plea, or have confessed and avoided the same, and not have replied that the defendant of his own wrong, and without the cause by him in his said first plea alleged, neglected to pay the amount of said bill in said first count of said declaration mentioned; and for that also the plaintiff hath, in and by his said replication to the said first plea, attempted to put in issue an interest in real property, to wit, the premises in respect of the payment of the rent for which the said bill was given, and *de injuriâ* cannot be replied so as to put in issue such interest in real property; and also, for that the said replication puts in issue several distinct and material allegations, that is to say, the fact of the said bill having been drawn by the plaintiff and accepted by the defendant, for the considerations in the first plea alleged, and the fact of the said assignment of the said messuage and dwelling-house and premises, with the appurtenants, unto the said *William Bradshaw*, of the defendant's want of notice thereof, as well as the notice by the said *William Bradshaw* to the defendant of such assignment, and of his thereupon requiring the defendant to pay to the said *William Bradshaw* the said rent so due for the said premises as aforesaid, and also the fact of the payment having been made by the defendant to the said *William Bradshaw* of the said rent, and other matters in the said plea contained, and therefore the said replication is double; and for that also the plaintiff hath in and by

his said replication to the said first plea, attempted to put in issue several distinct, material, and traversable allegations, all of which cannot properly be put in issue in and by such replication; and for that the said replication is double and argumentative, and no certain or sufficient issue can be taken thereon.

Joinder in demurrer.

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Manning Serjt., for the defendant. Supposing the court would in any case uphold that which Lord *Ellenborough* would have called "the prurient novelty" of a replication *de injuriâ* in an action *ex contractu* (a), the present replication is bad, for the cause specially assigned. (He was here called upon by the court to support the plea.) Although in the conclusion of his plea, the defendant relies upon a partial failure of consideration, which may not be a sufficient answer to a declaration upon a bill of exchange (b), it clearly appears that his acceptance was obtained by the fraudulent suppression of a fact, with a knowledge of which it is absurd to suppose that the acceptance would have been given.

Channell Serjt., *contra*, was stopped by the court.

TYNDAL C. J. Fraud is not to be presumed; and this plea neither alleges fraud, nor states any thing from which fraud is necessarily to be inferred. Then the plea is bad, as containing an answer to part of the cause of action stated in the first count, though pleaded as an answer to that count generally.

BOSANQUET J. The object of the plea was evidently to create difficulties in replying.

(a) *Vide antè*, Vol. I. 720. 7 *East*, 483. n.; 3 *I. P.*
(b) *Morgan v. Richardson*, *Smith*, 487. n.; 1 *Campb.* 40, n.

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MAULE J. The allegations in the plea do not necessarily lead to the inference of fraud on the part of the plaintiff. By the contract under which this reversion was assigned by the plaintiff to *Bradshaw*, it may have been stipulated on the part of the former, that the current rent should be paid to him and not to *Bradshaw*, though *Bradshaw* may afterwards have improperly received it from the defendant.

Judgment for the plaintiff.

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OFFLEY v. CLAY, and Another.

To a count for work done and attendance given by *A.*, then and still the wife of the plaintiff, for the defendants, and at their request, the defendants pleaded payments made from time to time to the wife, and acceptance by her in satisfaction of the cause of action and damages:
Held bad (*a*), for not averring that the wife was authorised by the plaintiff to receive payment.

ASSUMPSIT, for work done and attendance given by one *Ruth*, then and still being the wife of the plaintiff, for the defendants, at their request.

Second plea: that from time to time after the making of the said promise as to that count, and before the commencement of the suit, the defendants paid to the said *Ruth*, the wife of the plaintiff, who then accepted from the defendants, divers sums of money, amounting in the whole to a large sum, to wit, to the amount of the damages in the said declaration mentioned, in full satisfaction and discharge of the cause of action in that count mentioned, with all damages sustained by the plaintiff by reason thereof. Verification.

Demurrer, shewing for cause—that it is not averred, nor doth it appear in or by the said plea, that the said

(*a*) The demurrer was special, but the causes assigned raised objections, not of form, but of substance.

Ruth had at any time any authority or consent from the plaintiff to accept from the defendants any sum or sums of money in full satisfaction or discharge of the causes of action in the said first count mentioned, or of the damages sustained by reason thereof; whereas it is no answer to the said first count to say, that the said *Ruth* accepted the said sums in such satisfaction or discharge as aforesaid, without averring that she had the authority or consent of the plaintiff so to accept the same, inasmuch as the acceptance by the said *Ruth* could not be an acceptance by the plaintiff without his authority or consent thereto; and also for that it is not averred, nor doth it appear, in and by the said second plea, that the plaintiff accepted the said sums, or any of them, in such full satisfaction and discharge as aforesaid, but that it is merely stated in the said second plea that a third party, that is to say, the said *Ruth*, accepted the same as aforesaid, which is no answer to the causes of action in the said first count mentioned, or of the damages by the plaintiff sustained by reason thereof; and also for that it does not appear in or by the said second plea, that the defendants did not, at the time of such alleged payments to the said *Ruth*, and acceptance by her of the said sums in the said second plea mentioned, know that the said *Ruth* was the wife of the plaintiff. (a)

Joinder in demurrer. (b)

Channell Serjt., in support of the demurrer. The second plea is clearly bad for not averring that the

(a) The points marked for the plaintiff were, that the plea is bad, for that no authority is averred to have been given by the plaintiff to his wife, for her to accept the said sum as therein alleged, and for the other cause of demurrer specially assigned.

(b) The points marked for the defendants were, that as it

necessarily follows from the allegations in the first count, that the wife had the authority of the husband to earn the money, she must also have had his authority to receive it, and that the allegation of acceptance by the wife is therefore equivalent to an allegation of acceptance by the husband.

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plaintiff had authorised his wife to receive money which, though earned by her, is admitted by the plea to be due to him.

Manning Serjt. (with whom was *Talfourd* Serjt.), *contra*. The services of the wife were the meritorious cause of action. It is the ordinary course to pay for services to the person by whom they are performed, whether married or single. The usage is so general, that a jury would be bound to infer an authority from the husband, unless the contrary were shewn; *Evans v. Winifred Birch*. (a) An authority being implied in the statements contained in the plea, read in conjunction with the declaration, it was unnecessary to introduce a formal allegation of authority. If the plaintiff had countermanded the authority to receive payment arising out of the position of the parties and the general usage, he might have traversed such implied authority, and brought the case before a jury.

TINDAL C. J. Whether the plaintiff authorised his wife to receive payment from the defendants, would be properly a question for a jury. But if instead of pleading payment to the husband, the defendants choose to put upon the record the evidence of such payment, they should state the authority of the wife to receive, as well as the fact of payment. The defendants may have leave to amend, by pleading, within a week, a plea of payment to the plaintiff, otherwise there must be

Judgment for the defendant.

(a) 3 *Campb.* 10.

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PRIESTLEY, Clerk to the Undertakers of the navigation of the rivers Aire and Calder, acting under and by virtue of divers acts of parliament, and, amongst others, a certain act of parliament made and passed in the first year of the reign of His late Majesty King George the Fourth, intituled, "An act to enable the Undertakers of the navigation of the rivers Aire and Calder, in the West Riding of the county of York, to make a navigable cut or canal, from and out of the said navigation at Knottingley, to communicate with the river Ouze, near Goole, with two collateral branches, all in the said Riding, and to amend the acts relating to the said navigation," *v.* **FOULDS.** (a) Nov. 13.

ASSUMPSIT, for money had and received, and upon an account stated. Plea: non assumpsit. An incorporated company is authorised by act of parliament

On the 14th of *January* 1840, it was ordered by *Bo-* ment to make a navigable canal, the construction of which will interfere with an antient drain. By one section of the statute the company is required to make a drain on each side of the canal, and parallel therewith, in lieu of part of the antient drain which will be destroyed. By another section the company is required to make such arches, tunnels, culverts, *drains*, or other passages, over, under, by the side of, or into the canal, and the trenches, streams, and water-courses communicating therewith, and the towing paths on the sides thereof, of such depth, breadth, and dimensions as shall be sufficient to convey the water clear from the lands adjoining or lying near the canal, without obstructing or impounding the same; and to support, maintain, cleanse, and keep in repair all such arches, tunnels, culverts, *drains*, and other passages:

Held, that the drains made in pursuance of the former section, in lieu of the antient drain, are to be cleansed by the company, as well as those made in pursuance of the latter section; and that a summary remedy given by the latter section, in case of non-repair by the company, is applicable to a default in cleansing the drains made in lieu of the antient drain.

¶ (a) In this and the two following cases judgment was given on the last day of *Michaelmas* term.

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sanquet J. that the facts should be stated in a special case for the opinion of the court, and that judgment should be entered for the plaintiff or defendant by confession of *nolle prosequi*, as the court should think fit; whereupon the parties agreed upon the following case: —

The *Fleet Drain* was an antient drain, commencing on *Knottingley* common lands, and terminating in the river *Went*, in the county of *York*.

It received the drainage water of the greater portion of nine townships situate in the line thereof, and was in length about eight or nine miles. The lands through which the *Fleet Drain* passed were formerly commons and waste grounds, but had been all enclosed many years before the making of the *Knottingley* and *Goole Canal* hereinafter mentioned.

By the 12 G. 3. c. xxxviii., intituled “An act for dividing and inclosing the open commons, arable fields, and the common meadows, pasture grounds, commons, and waste grounds within the townships of *Pollington*, *Baln*, *Whitley* and *Whitley Thorpe*, *Great Heek* and *Little Heek*, in the parishes of *Snaith* and *Kellington*, in the county of *York*,” after directing certain commissioners to set out, make, and widen all fences, ditches, drains, water-sewers, cloughs, bridges, and other requisites, as well in, over, or upon the lands and grounds inclosed and to be inclosed in the said several townships (which included the said *Fleet Drain* so far as the said townships extended, and the portion of such *Fleet Drain* now in dispute), it was enacted, that all such public drains, water-sewers, cloughs, and bridges, when so set out, made, and widened as aforesaid, should, from time to time, be cleansed, repaired, and kept in repair, by the inhabitants of the respective townships within which they were situate, in such manner, and the expenses thereof were to be raised and assessed in the same way, as any

other public or parochial rates or taxes were by law provided to be assessed, raised, and levied; and that the constable within each of the said townships for the time being, should, for ever thereafter, cause the said public drains, watercourses, cloughs, and bridges, to be cleansed and put in sufficient repair twice, to wit, on or before the 10th of *June* and 29th of *September*, in every year; and it was thereby provided that the same ways and means, by presentment, indictment, or otherwise, might be taken for compelling the said public drains, watercourses, cloughs, and bridges, to be cleansed and kept in repair as if that act had not passed.

The commissioners named in the act carried into execution the directions therein contained, as regarded the *Fleet* and other drains; and a certain part of the *Fleet Drain*, they, by their award, declared to be in the townships of *Whitley* and *Whitley Thorpe*; and according to the provisions of the same statute, such part of the *Fleet Drain* was, until the making of the *Knottingley and Goole Canal*, scoured and cleansed by the townships of *Whitley* and *Whitley Thorpe*, by means of a rate levied on such townships. The *Fleet Drain* was the boundary between *Beal* and *Criddling Stubbs*, *Whitley* and *Kellington* and *Egbrough*, but ran through the townships of *Heck* and *Pollington*. The *Fleet Drain* was always cleansed and repaired by the township of *Beal*, against or opposite to *Criddling Stubbs*; by the township of *Whitley*, against, or opposite to, the townships of *Kellington* and *Egbrough*; and by the respective townships of *Heck* and *Pollington*, so far as the same ran through these townships of *Criddling Stubbs*; *Kellington* and *Egbrough* never had any part of the *Fleet Drain* to cleanse out. Floods sometimes occurred in the river *Went*, when the water backed up the course of the *Fleet Drain* to a bridge in *Pollington*, called *Barker's Bridge*.

An act passed in the 1 G. 4. c. xxxix. intituled "An

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act to enable the Undertakers of the navigation of the rivers *Aire* and *Calder*, in the West Riding of the county of *York*, to make a navigable cut or canal from and out of the said navigation, at *Knottingley*, to communicate with the river *Ouze* near *Goole*, with two collateral branches, all in the said Riding; and to amend the acts relating to the said navigation."

By the first section it was enacted, that it should be lawful for the said Undertakers to make complete and maintain a cut or canal from and out of a certain other cut in the township of *Knottingley*, in and through the several townships and places in such act mentioned, to join and communicate with the river *Ouze*, at or near the outfall of the *Dutch River*, in the township of *Goole*; and also to make and maintain the other cuts and branches in the said act mentioned; and to make such trenches or passages for water, in, upon, or through the lands or grounds adjoining to the said proposed canal and cuts as the said Undertakers should think fit; and to make proper and convenient soke-drains or passages for water, on the side or sides of the said first-mentioned cut or canal from or near to *Stubbs Lane*, in the township of *Knottingley*, to a certain place near to *New Bridge*, with a proper sluice or tide-gate to the same as a substitute for the then existing drain or dyke called the *Fleet Drain*, which, from *Stubbs Lane* to a certain place at the extremity of the township of *Pollington*, was intended to be used as part of the line of the said first-mentioned cut or canal; and for the purposes aforesaid, or any of them, to enter into and upon the lands and grounds of any person or persons whatsoever, and to set out and ascertain such parts thereof as they should think necessary and proper, for making the proposed canal, and the cuts or branches, and drains, feeders, bridges, aqueducts, towing-paths, basins, docks, wharfs, warehouses, and all such other works, matters,

and conveniencies, as they should think proper and necessary for effecting, preserving, completing, maintaining, and using the said canal, and cuts or branches, and other works; and also to bore, dig, cut, trench, sew, excavate, get, take, or remove, carry away, and lay, earth, clay, stone, soil, rubbish, timber, and other trees, beds of gravel or sand, or any other matters or things which might be dug or got in making the said canal and cuts or branches, drains, feeders, aqueducts, or other works, out of or upon the lands or grounds of any person or persons adjoining or contiguous thereto, and which might be proper or necessary for making, carrying on, continuing, maintaining, or repairing the said canal, cuts, or branches, drains, and other works, or which might hinder, prevent, or obstruct, the making, using, or completing, extending or maintaining of such feeders, trenches, tunnels, passages, aqueducts, and watercourses, as should be necessary and proper to convey water to and from the said canal, and cuts or branches, according to the true intent and meaning of the said act; and to make, build, erect, and set up, in or upon the said canal and cuts or branches, and drains, or either of them, or upon the lands adjoining the same respectively, such and so many bridges and aqueducts, and such and so many piers, arches, tunnels, sluices, flood-gates, stop-gates, weirs, pens for water, water-tanks, drains, &c., as and where the said undertakers should think necessary and convenient; and also, from time to time, to alter, repair and amend, or discontinue the same; and also to make, maintain, repair, and alter, any fences or passages over, under, or through the said canal and cuts, or branches, drains, and other works, or the tunnels &c. respectively, which should communicate therewith; and also to make such roads, ways, culverts, and bridges as the said Undertakers should think necessary and expedient for

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the use and occupation of the owners or occupiers of any such lands and grounds as should be cut through, separated, or divided, or otherwise affected by, or the use or occupation of which should be obstructed or rendered inconvenient in consequence of, the making the said canal and cuts, or branches and drains, or any of them; and to construct, erect, make, and do all other matters and things which they should think convenient and necessary for making, effecting, preserving, improving, completing, and using the said canal, cuts, or branches and drains, and other works, in pursuance of, and according to the true intent and meaning of, the said act, the Undertakers doing as little damage as might be in execution of the several powers to them thereby granted, and making satisfaction, in manner therein mentioned, to persons interested in lands, messuages, buildings, tenements, and hereditaments, waters, and water-courses, brooks, and streams respectively, which should be taken and removed, diverted, or prejudiced, for all the damages to be by them sustained, in or by the execution of all or any of the powers of the said act; subject nevertheless to such provisions and restrictions as were therein contained.

By sect. 32. it was enacted, that all and every the lands, grounds, and hereditaments to be purchased, taken, or used by virtue of the powers of the said act, for the purposes thereof, together with the canal, cuts, drains, and other works, thereby authorised to be made, and all and every the messuages, &c., which should be erected or built, or provided under the powers of the said act, and all the rates, tolls, and duties, by that act granted, should be and stand vested in the same trustees, their heirs and assigns, in the same manner, with the like indemnification, and upon the same trusts and for the like purposes, and the profits and advantages to arise under the said act should be applicable to such and the

same uses and purposes, as the property of the Undertakers in the navigation of the said rivers *Aire* and *Calder*, and the canals and other works authorised to be made by the said therein recited acts, were or stood vested in and were applicable to.

By sect. 85. it was enacted, that the Undertakers should, and they were thereby required, at their own costs, to make a drain on each side of, and parallel to, the said canal, from *Stubbs Lane*, in the township of *Knottingley*, to near the eastern extremity of the township of *Pollington*, in lieu of that part of the *Fleet Drain* which would be so destroyed; and that, at the last mentioned place, the water from the north drain should be passed under the canal by means of a culvert, and conveyed, together with the water in the south drain, along the south side of the canal, by a sufficient drain, to the river *Dun*, at or near to *New Bridge*, where a proper sluice or tide-gate should be erected, the area of the waterway of which should be not less than fifty-four square feet; provided always, that the said drains, at their commencement at *Stubbs Lane*, should be at least twelve inches deeper than the then existing drain at that place.

And by sect. 86. it was further enacted, that the Undertakers should, and they were thereby required, at their own costs, to make such arches, tunnels, culverts, drains, or other passages, over, under, and by the side of, or into the said canal, and the trenches, streams, and watercourses communicating therewith, and the towing-paths on the sides thereof respectively, of such depth, breadth, and dimensions as should be sufficient, at all times, to convey the water clear from the lands adjoining, or lying near to, the said canal, without obstructing or impounding the same; and likewise to make such back drain or drains as might be necessary and sufficient to carry away any water which might ooze or pass through any of the banks of the said canal,

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to the prejudice of any of the lands or grounds contiguous or near thereto; and that all such arches, tunnels, culverts, drains, back drains, and other passages, should, from time to time, be supported, maintained, cleansed, scoured, and kept in good and sufficient repair by the Undertakers; and if, at any time after 20 days' notice in writing should, by or on behalf of any owner or occupier of land adjoining or lying near to the said canal, be given to the Undertakers that the said arches, &c., or any of them, were or was not made, cleansed, maintained, and repaired, according to the true intent and meaning of the said act, it should be lawful for any person or persons to apply for and obtain an order in writing from any two or more of the justices of the peace for the West Riding, from time to time as often as there should be occasion, and the said justices were thereby authorised and impowered, at their discretion, to make and grant such order, enabling such person or persons to cleanse and repair such arches, &c. accordingly; and that the reasonable expenses thereof (to be ascertained by such justices) should be defrayed by the Undertakers; and in the case of neglect or refusal to satisfy and defray such expenses for the space of ten days after demand thereof made upon the Undertakers, such expenses should and might be levied and recovered by distress and sale of the goods and chattels of the Undertakers, in the same manner as any other costs and charges might, by virtue of that act, be levied and recovered from the Undertakers; provided nevertheless, that nothing therein contained should extend to enforce or authorise the admitting of any water arising from floods into the said canal which might injure the said navigation.

[The special case also set out the third and the seventy-third sections of the act; the former restricting the Undertakers from taking more than sixty yards of

land in breadth for the canal, drains, &c.; the latter requiring them to make hedges, arches, and passages over the canal, drains, &c. These sections do not appear to affect the question before the courts, and neither of them was adverted to in the argument or in the judgment.]

Under the authority of the above act, the Undertakers of the *Aire and Calder Navigation* made a cut or canal from *Knottingley* to the river *Ouse*, near *Goolc*, and in making it, they adopted the line of the *Fleet Drain* as nearly as practicable; but from the irregular line of the drain, and the comparatively straight course of the canal, it followed that the canal was sometimes formed out of part of the *Fleet Drain*, and also frequently crossed it, leaving several disjointed portions thereof on each side of the canal.

The Undertakers, in making the new drains on each side of this cut or canal in lieu of the *Fleet Drain*, made use of the disjointed portions of the old drain, where they were available; and, after straightening and enlarging them, connected the same by new drains, so as to form two distinct lines of drainage through the whole length from *Stubbs Lane* to nearly the eastern extremity of *Pollington*.

The new portions of the drains were made twelve inches deeper than the old drain at their commencement at *Stubbs Lane*. Near the eastern extremity of *Pollington*, the Undertakers made a culvert under the canal for passing the water from the North Drain into the South Drain, where it meets the antient course of the old *Fleet Drain*; and for carrying the combined waters of the two drains, they continued the South Drain from the same point of the eastern extremity of *Pollington* along the south side of the canal to the river *Dun*, near the new bridge.

The former outfall of the *Fleet Drain* into the river

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The continuation of the drainage made by the Undertakers on the south side of the canal, and the last-mentioned continuation of drainage (which was made by the Undertakers in 1826), as well as the sluice or tide-gate into the river *Dun*, have always, since the year 1831, been repaired and maintained by the Undertakers; and no other persons have, at any time since the making thereof, repaired or maintained the same.

All these works were completed several years ago. The present question has been agitated between the company and the landowners ever since the making of the drains, and (with the exception of the continuation of the drainage on the south side of the canal, and the sluice or tide-gate, which have been repaired and maintained by the Undertakers as above-mentioned) they have been repaired by no one until the present proceedings.

The lands between the old portions of the *Fleet Drain* and the canal have, with the exception of a strip of land belonging to *J. B. S. Morritt*, and lying on the south side of the canal in the township of *Egbrough*, and of another piece on the north side of the township of *Heck*, belonging to *Sir Samuel Crompton, Bart., &c.*, been purchased by the Undertakers, as well as the lands now constituting the new drains.

The Undertakers do not make use of the new drains for any purpose connected with the canal; but they, or their tenants, as owners or occupiers of the lands so purchased by them as aforesaid, together with the other owners or occupiers of lands on the sides of these drains, have the benefit of the drains for the drainage of such lands which were formerly sewed by the *Fleet Drain*. There is no apparent back-water from the canal which enters these drains, nor does there appear to be any

oozing from the banks of the canal; and the drains are ample and sufficient, when properly cleansed and scoured, to take away all the water from the adjoining lands. But should there be any oozings from the canal, there are no other means of taking them away save by the said drains.

J. B. S. Morritt is the owner, and the defendant is the occupier, of certain lands in the township of *Egbrough* on the north side of the canal, partly bounded by portions of the antient course of the *Fleet Drain*, but more by a portion of one of the connecting drains made by the Undertakers.

The Undertakers have not purchased the strip of land belonging to *J. B. S. Morritt's* estate, which lies on the south, or opposite, side of the canal; nor have they purchased the strip of land before mentioned, belonging to *Sir S. Crompton*, between the drain and the canal, as those gentlemen declined to sell them. These are the exceptions referred to in a former part of the case. There are other owners and occupiers of lands in the same township, whose lands are similarly situated and bounded with those of *J. B. S. Morritt*.

Prior to the alterations of the *Fleet Drain* under the authority of the above-mentioned act, and the formation of the two lines of drainage (one on the *Whitley*, the other on the *Egbrough* side of the canal), both *J. B. S. Morritt* and his tenant, the defendant, and the owners and occupiers of land in *Egbrough*, adjoining the *Fleet Drain*, had such lands drained by the *Fleet Drain*, free of any charge in respect of that drain, the *Fleet Drain* being, so far as the same bounded the township of *Egbrough*, cleansed and repaired by the township of *Whitley* solely.

The township of *Whitley* refuses to cleanse the two drains made by the Undertakers in lieu of the old *Fleet Drain*, or, at all events, the drain on the *Egbrough* side

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of the canal, on the alleged ground that it is a new and additional burthen, which the above-mentioned act does not impose upon them, and which they contend they are not on any other ground subject to, because the drain on that side the canal, so far as it consists of portions of the old *Fleet Drain*, is severed by the canal from the remaining lands of their township of *Whitley*; and, so far as it consists of the new connecting portions of drain, are wholly out of their township of *Egbrough*.

On the 30th of *April* 1836, the defendant caused to be served upon the Undertakers a notice to cleanse the drain within the township of *Egbrough*, pursuant to sect. 86. of the 1 G. 4. c. xxxix.

The Undertakers declining to comply with this requisition, the defendant applied to two justices of the peace for the West Riding, and obtained an order to cleanse it himself; having obtained this order, the defendant proceeded to cleanse the whole of the drain lying north of the canal, within the township of *Egbrough*, including both the antient portion of the *Fleet Drain*, and the new connecting drains made by the undertakers, at the expense of 23*l.* 9*s.*; and on the 27th of *October*, 1836, he caused the Undertakers to be served with notice of his intention to apply to the justices in petty sessions, at a time and place therein mentioned, to ascertain the reasonable expesnes incurred in the cleansing of the drain.

The Undertakers did not attend the meeting of justices according to this notice, or oppose the making of the further order hereinafter mentioned; but their engineer was present, to watch the proceedings on their behalf. The justices, on the application of the defendant, made an order upon the Undertakers for the payment of the sum expended by the defendant in so cleansing the drain, together with the expenses of his application.

The amounts specified in such last-mentioned order were subsequently levied upon the Undertakers, under a distress warrant obtained by the defendant, together with the costs of distress, amounting altogether to 26*l.* 10*s.* This sum was paid by the Undertakers to the defendant under protest; and this action was commenced to recover it back.

It was agreed that all questions of form, both as to the action, and the different proceedings, and orders, and the warrant of distress, should be waived on both sides, that the foregoing facts should be admitted, and that a case should be stated between the parties, under 3 & 4 *W. 4. c. 42. s. 25.*, for the opinion of the court upon the construction of 1 *G. 4. c. xxxix.*, to any part of which, as well as to the previous acts of 10 & 11 *W. 3. c. 19.* and 14 *G. 3. c. xcvi.* relating to the said navigation, and the inclosure act of 12 *G. 3. c. xxxviii.*, either party was, on the argument, to be at liberty to refer.

The question for the opinion of the court is, whether the Undertakers are liable to pay the money so expended or any part thereof, or to cleanse or scour out such parts of the drain as are referred to in the notice of the 30th *April*, 1836, or any, and if any, what part thereof.

Wightman (with whom was *Atcherley* Serjt.), for the plaintiff. The statute of 1 *G. 4.*, under which the drains in question were constructed in lieu of the *Fleet Drain*, contains no clause imposing on the Undertakers of the *Aire and Calder Navigation* the burthen of repairing the substituted drains; and in the absence of any provision transferring the liability to the Undertakers, the burthen must remain with the parties, whoever they may be, whose duty it was to repair the *Fleet Drain*, for which the drains in question are substituted. The clauses by which the Undertakers are authorized and required to

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make collateral drains in lieu of such part of the *Fleet Drain* as would be destroyed in constructing the canal, are the first and the eighty-fifth section; and neither of these sections contains any thing from which it can be inferred that the liability to repair the substituted drains was to be thrown upon the Undertakers. It will not be pretended on the part of the defendant, that any part of the act, prior to the eighty-sixth section, charges the Undertakers; and the question for the decision of the court will be, whether, under that section, the Undertakers are bound to repair the drains substituted for the *Fleet Drain*. It is submitted that the clause refers only to the drains and other works which are by that section required to be made for the particular purposes therein mentioned; that is, drains and works “necessary and sufficient to carry or convey any water which may ooze or pass through any of the banks of the canal, to the prejudice of any of the lands or grounds contiguous or near thereto.” [*Tindal* C. J. Do you shew any other persons liable to repair?] It is found as a fact that the townships were bound to repair part, and though the case is silent as to the rest, it is immaterial to the Undertakers who the parties are who, at common law or by statute, are bound to repair the different parts of the *Fleet Drain*. If *Whitley* was bound to repair a part before the opening of the canal, such liability is still continuing; or the effect of the statute may be, to discharge *Whitley* on the making *Egbrough* liable. [*Tindal* C. J. The words are large enough to make the Undertakers liable if others are exempted.] Why should the townships be exempted from the previous liability, in consequence of a substitution from which they, and not the Undertakers, get a benefit? [*Maule* J. It is the eighty-sixth section which gives the benefit. The meaning of the two sections taken together is this: you shall carry all water away, and for

that purpose shall make all necessary drains, but particularly two drains parallel to the canal. *Coltman J.* According to your construction, the Undertakers would not be bound to keep the *culverts* in repair.] If the Undertakers create any additional impediment, or do any act by which the making of other drains becomes necessary, they are bound to make them. But it does not appear that there is any pretence for charging the Undertakers upon any such ground. [*Tindal C. J.* Suppose the case of a party liable to repair a highway *ratione tenuræ*, and an act of parliament to pass empowering other parties to make a new road in substitution for the old highway, would that impose upon the party originally liable to repair the old highway, the burthen of repairing the new road, without express words? *Coltman J.* By the former act (a) all drains were to be kept in repair by the inhabitants of the respective townships within which they were situate.] The substituted drains are situate in different townships from those through which the *Fleet Drain* ran. It would be strange if the effect of the last statute were to transfer the liability from one township to another.

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Watson, W. H., for the defendant. The true construction of the statute of 1 G. 4. is, that the Undertakers are bound to make sufficient drains, &c., to drain the lands lying north and south of their canal, and to make particular drains in substitution for the *Fleet Drain*. Under the former act of 12 G. 3., the commissioners were to declare in what townships the drains were to be considered as situate, and each township was to repair the drains within its limits. That part of the *Fleet Drain* which formed the boundary between *Whitley* and *Egbrough* was declared by the commissioners to be in

(a) *Supra*, 177, 178.

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Whitley, and the consequence was, that the lands in *Egbrough* were drained without any expense to the owners of those lands. But the substituted drains are wholly within the township of *Egbrough*, and if the plaintiff's argument were allowed to prevail, *Whitley* would be bound to repair a drain no part of which lies within that township. [*Tindal* C. J. The question is, whether the words "in substitution for" and "in lieu of," do not carry with them all the previous liability. This is a private act of parliament, and must be construed as if it were the *deed* of the Undertakers of the *Aire and Calder Navigation*.]

The legislature would not have passed an act, having the effect now contended for, without hearing the township of *Whitley*. Why should the magistrates have power to require the repairing of some drains and not of others? It is unnecessary to say upon whom the burthen is to rest, if not upon the Undertakers. *Egbrough* is not liable, and there is nothing in the statute to make *Whitley* liable. Suppose a railway is to cross a road by a bridge, the county would not be liable, neither would the parish; the burthen would rest upon the railway company for whose purposes it was erected; *The King v. The Inhabitants of the Parts of Lindsey*. (a) In *The King v. The Inhabitants of Kent* (b), the *Medway* Navigation Company was empowered to make the river navigable, and required to amend or alter such bridges, &c., as might hinder the passage or navigation, leaving them, or others as convenient, in their room. Lord *Ellenborough* says "the statute gives power to the company to take or alter the old highway for their own purposes, on condition of leaving another passage as convenient in its room; and if they do not perform the condition, they are not en-

(a) 14 *East*, 317.

(b) 13 *East*, 220.

titled to do the act. (a) It is a continuing condition; and when the company thought proper for their own benefit to alter the highway in the bed of the river, so that the public could no longer have the same benefit of a ford, they were bound to give another passage over the bridge, *and to keep it for the public.*" Here, the eighty-fifth section is in the nature of a condition. [Maule J. referred to *The Queen v. The Commissioners of the Thames and Isis Navigation*. (b)] *The King v. Kerrison*. (c) The *Fleet Drain* and the substituted drains have not the same outlet; the former emptied itself into *Went*, the latter are carried on to the *Dun*.

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Wightman, in reply. The cases cited for the defendant do not apply. In *The King v. The Inhabitants of the Parts of Lindsey*, the canal company had erected a bridge which was entirely a new work, and in substitution for an old bridge. [Maule J. Suppose the new work had been the making of a wider bridge than that which was there before.] In this case there is no suggestion that the substituted drains are not equally convenient to the public with the *Fleet Drain*, — nothing to shew that an increased burthen is thrown upon any one. In respect of the old drain, and those substituted for it, the liability was intended to remain as before. The new drains being introduced by the Undertakers, the burthen of repairing such drains was properly thrown upon them.

TINDAL C. J. This case is not without difficulty; but, according to the best construction I can put upon

(a) The leaving of the same bridge or highway could not be a condition *precedent*. The nonperformance of the condition would, therefore, not affect the right of the company to do the act, but would expose the

company to a mandamus to compel them to do the act, and also to an indictment for not having done it at the proper time.

(b) 8 A. & E. 901.

(c) 3 M. & S. 526.

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it, I am of opinion that the case falls within, and is to be governed by, the eighty-sixth section; and that the cut or drains parallel to the canal are to be repaired by the undertakers of the *Air and Calder Navigation*, and that the remedy by application to the magistrates, and distress upon the goods and chattels of the Undertakers, has been properly applied. (His lordship here read the first section of the act.) By this section specific power and authority are given to the Undertakers to make use of the old *Fleet Drain*, and power is given to make proper drains as a substitute for the *Fleet Drain*. Very large powers are given to the Undertakers not only for making, but for maintaining the works which that section authorised them to construct. The eighty-fifth section is more specific: it is no longer left as a power to the undertakers, but they are compelled to make specific drains near the eastern extremity of, and parallel to the canal. Then we come to the eighty-sixth section, (which his lordship then read.) By that section all such drains, &c., are to be supported, maintained, cleansed, &c., by the Undertakers. The question is, whether these general words include the works required to be completed by the eighty-fifth section. The first observation that occurs is, that the words are large enough; and that if the eighty-fifth and eighty-sixth sections be read continuously, there is no difficulty. Then if the words be large enough, the question is, whether, according to the reason of the thing, they ought to be considered as included. See how the obligation stood before. By 12 G. 3. the drains are required to be cleansed and repaired by the inhabitants of the township within which they are respectively situated; and under this provision that part of the *Fleet Drain* which bounded the townships of *Egbrough* and *Whitley Thorpe* was scoured and cleansed by *Whitley* and *Whitley Thorpe*, by means of a rate levied on those

townships; but by the act of 1 G. 4., the new drains are no longer in *Whitley*, but in *Egbrough*: and by the thirty-second section those drains are the private property of the Undertakers. *Whitley* is no longer liable. What authority is there to say that the burthen should continue against *Whitley* after the drain has ceased to be in their township; and the act contains no words to throw the burthen upon *Egbrough*. Then, if the words are sufficient to include the Undertakers, what other intention can the legislature have had, when it withdrew the burthen from those who were formerly liable, without, in terms, imposing it on any one else, except to allow it to fall upon those in whom the property in the new drains was vested, and for whose purposes those drains were constructed. In *The King v. Kent* it was held, that a clause directing the erection of a bridge, imposed a continuing obligation. That case appears to me to furnish a key to unlock the meaning of this act of parliament. There, the power of building of a bridge in lieu of a ford, which the *Medway Navigation Company* were authorised to destroy, — here, the power of substituting new drains for the old *Fleet Drain*, — were conferred by the legislature for the particular benefit of the respective companies. This case, therefore, falls within the well known maxim "*qui sentit commodum sentire debet et onus*." I am of opinion that judgment must be entered for the defendant.

BOSANQUET J. I am of opinion that, according to the true construction of the act of 1 G. 4., the Undertakers are liable to repair the substituted drains, and that there is enough to bring the Undertakers within the jurisdiction of the magistrates, and that the order is good. The question is, whether the Undertakers are liable to repair these drains as well as to make them. The first section gives them *power* to do both without any doubt;

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it authorises them to make, and also to maintain, a drain or drains in substitution for the *Fleet Drain*. The land is their own; and they are required, for their own convenience, to make these substituted drains. This is a case of a *continuing* condition, falling within the principle of the *King v. The Inhabitants of Kent*. It is no part of the question here, whether *Whitley* is bound to repair; the point for our consideration is, whether the words at the end of the eighty-sixth section are large enough to embrace the drains required to be made by the eighty-fifth section; the eighty-sixth section directing that all such arches, tunnels, culverts, drains, back drains, and other passages, shall from time to time be supported, maintained, cleansed, scoured, and kept in good and sufficient repair by the said Undertakers. I think that this clause embraces, not only drains mentioned in the former part of that section, but also the drains required to be made by the eighty-fifth section. It appears to me that the intention of the legislature was, that the Undertakers should repair what is substituted in lieu of that which is destroyed?

COLTMAN J. I am also of opinion that judgment should be entered for the defendant. This is an enactment for the benefit of a particular class of persons, and ought to be construed so as to protect the public against inconvenience. The words of the act must be considered as the language of the company, which ought to be construed *fortius contra proferentem*. The most natural construction of the words of the eighty-sixth section would, I think, be to confine their operation to the drains, &c. mentioned in the preceding part of *that* section, as necessary for the carrying off of water which might ooze or leak from the canal, as contended for by Mr. *Wightman*. But looking at the intent of the act, and to meet the justice of the case, I think we should

give to the clause in question, the extended construction contended for by Mr. *Watson*. I think, therefore, that the Undertakers are bound to repair these drains in all future times.

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MAULE J. I am of the same opinion. It appears to me that the Undertakers are liable to repair the drains in question. The antient drain called the *Fleet Drain*, to some extent drains the lands which are now drained by the substituted drains. The act requires the company to construct drains which shall be twelve inches deeper, and ending in the river *Dun*. These drains would be carried below the river *Went*, into which the *Fleet Drain* discharged itself, and would therefore create a more complete drainage than was obtained by the *Fleet Drain*, which discharged itself into the *Went*. But the act also required the Undertakers to make drains sufficient to carry off the water. Part therefore of the construction of the privilege conferred by the act was, that the adjoining landholders should have a better and more effectual drainage. The inhabitants of the townships were bound to repair the old water-course; but here the object is, to charge them with a burthen to which they were not before subject. The question is, not so much whether the townships are not liable, but whether the Undertakers are liable; because it is possible that neither the townships nor the company may be liable. The Undertakers have clearly the power of doing that which is now required of them. The first section empowers them to make these drains, and the same section empowers them to repair them. It is not very likely that this should be left to the *option* of the company. The thirty-second section vests the property of the drains, &c. by that act authorised to be made, in the Undertakers, as their property. The eighty-fifth section requires the company to do that which they

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were previously authorised to do. It does not contain any express mention of the subject of repairing; but the object and the intent of the legislature were, that the Undertakers should make a drain, and that they should keep it in a proper state. The power is given to make and to maintain. The eighty-sixth section is not distinguished on the parliament roll from the eighty-fifth; and it appears to me, that the words "all such arches, tunnels, culverts, drains, back drains, and other passages," in literal construction, apply to the drains mentioned in the eighty-fifth section, as well as those in the eighty-sixth. What is said at the close of the eighty-fourth section (*a*), as to the *Dutch* river, rather confirms this construction. This is an act of parliament passed for the benefit and profit of the Undertakers; and the rule of construction applicable to such cases in favour of the public, is correctly stated by Lord *Tenterden*, in the case of the *Stourbridge Canal Company v. Wheeley*. (*b*)
 Judgment for the defendant.

(*a*) This section is not set out in the special case.

(*b*) 2 B. & Ad. 792.

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ASSUMPSIT, on a bill of exchange, dated the 8th of February, 1838, drawn by the Plaintiff, payable to his own order, for 49*l.* 14*s.* 6*d.*, at three months after date, upon, and accepted by, the defendants, by the name and style of *Bailey, Potter, and Co.* Second count, for 110*l.* 4*s.* 6*d.*, for the hire of horses, chaises, &c. Third count, for 115*l.*, upon an account stated.

Bailey and Potter suffered judgment by default.

The defendant *Lewis* pleaded to the first count, that at the time of the accepting of the bill, he and the other defendants were in partnership as wholesale druggists; and that the other defendants (a) accepted the bill, in the name of the partnership, without the knowledge, privity, or consent of the defendant *Lewis*, for and in respect of a debt owing from the other defendants to the plaintiff, before the defendant *Lewis* became partner as aforesaid, and not for, or in respect of, any matter or thing in any way relating to the said partnership. Verification. To the second and third counts the defendant *Lewis* pleaded non assumpsit, except as to 30*l.* 15*s.*, and as to that sum, a tender.

The plaintiff replied *de injuriâ* (b) to the first plea; added the similiter to the second plea; and, confessing the tender, took the 30*l.* 15*s.* out of court.

plaintiff if it appear that the consideration of the bill was a debt which had arisen partly before, and partly after, the commencement of the partnership.

Semble, that the proper plea would have been, *non acceptavit*.

(a) The evidence was, that *Bailey* accepted in the absence of *Potter*; and the term "accepted" is here used in the sense of an acceptance, not in law, but in fact. A joint ac-

ceptance by the *three* defendants is impliedly confessed by the plea.

(b) As to this replication in assumpsit, see Vol. I. 720.

In an action by *A.*, the drawer and payee of a bill of exchange against *B.*, *C.*, and *D.* as acceptors, *D.* pleads that *B.*, *C.*, and *D.* were partners, and that the bill was accepted by *B.* and *C.* without his knowledge, privity, or consent, in respect of a debt contracted by *B.* and *C.* before the partnership, and not in respect of a debt relating to the partnership.

Upon a replication *de injuriâ* to this plea, the issue must be found for the

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At the trial before *Coltman J.*, at the sittings at *Guildhall*, after *Hilary* term, 1839, the following facts appeared: —

The plaintiff, a livery-stable-keeper in the *Blackfriars' Road*, was in the habit of supplying *Bailey, Potter, and Co.*, wholesale druggists on *Garlick Hill*, with horses and gigs, for the use of their travellers. The firm of *Bailey, Potter, and Co.* consisted of the defendants *Bailey* and *Potter*, and a dormant partner of the name of *Clift*, until the 31st of *December* 1837, when the partnership between *Bailey, Potter, and Clift* was dissolved, and *Clift* retired from the concern. On the 1st of *January* 1838, the defendant *Lewis* became a dormant partner in the business, with *Bailey* and *Potter* (a); and the business was carried on under the same firm as before.

The consideration for the acceptance of the bill mentioned in the first count, is stated in the following account, rendered by the plaintiff to *Bailey, Potter, and Co.* in the beginning of *February* 1838.

To Mr. *Wilson*.

1837.		£	s.	d.
August 29.	} Use of horse and chaise, twenty weeks and three days, at 35s. per week.			
to				
January 18.				
		-	-	- 35 15 0
November 1.	} Use of horse and chaise, nine weeks and five days, at 35s. per week			
to				
January 7.				
		-	-	- 17 0 0
				<hr/>
				52 15 0
	By repairs to chaise	-	3 0 6	
				<hr/>
				£49 14 6
				<hr/>

(a) As to the circumstances under which *Lewis* became a partner, see *Battley v. Lewis*, *antè*, Vol. I. 155.; 1 *Scott, N. R.* 143. *S.C. per nom. Battley v. Bailey, Potter, and Lewis.*

Out of the 17*l.* the sum of 1*l.* 15*s.* for one week's hire of the horse and chaise had accrued after the commencement of the new partnership. (a)

Upon the second count, the plaintiff's demand was for 60*l.* 10*s.* in respect of a subsequent supply of gigs and horses, and the question as to the claim beyond the sum tendered was, whether the credit had been given to the firm, or to a traveller by whom, as between him and his employers the charge for horses and gigs was to be borne. Upon the evidence, *Wilde* Serjt. admitted that he could not resist this part of the claim, and consented to a verdict for 29*l.* In a letter from the plaintiff's attorney, dated 2d of *June* 1838, requiring payment of this 60*l.* 10*s.*, the former account was thus spoken of: "Moreover, Mr. *Wilson* has a further prior demand on Messrs. *Bailey*, *Potter*, and *Clift*, your predecessors in the business, for 49*l.* 14*s.* 6*d.*, which must of necessity be postponed." *Bailey* and *Potter* were then bankrupts, and defendant became so shortly after.

It was contended on the part of the plaintiff, that this charge of 1*l.* 15*s.* having occurred after the partnership had commenced, disproved the special plea, and entitled the plaintiff to a verdict on the issue of *de injuriâ*. The learned judge was, however, of opinion that the contract in respect of which the bill had been accepted having been antecedent to the formation of the new partnership, the defendant *Lewis* was not liable (b);

(a) A large portion of the 35*l.* 15*s.* had also accrued after the commencement of the partnership; the only difference with respect to the portions of the 35*l.* 15*s.* and of the 17*l.* which had so accrued, being, that the former sum was charged in respect of a horse and gig furnished to a traveller who, as between himself and his employers, provided his own horse and gig.

(b) The traveller, during his journey from 1st of *November* 1837 to 7th of *January* 1838, used the plaintiff's horse and gig upon a hiring by *Bailey*, *Potter*, and *Clift*; and if, after the retirement of *Clift* on the 31st of *December* 1837, *Bailey* and *Potter* had continued the business alone, it would seem that *Clift* would have been liable for the whole time that the horse and gig were out

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and a verdict was taken upon the first issue for the defendant, and upon the second issue for the plaintiff, damages 29*l.* 15*s.*; leave being given to move to enter a verdict for the plaintiff on the first issue; and it was agreed that the court should, upon the motion, be at liberty to draw the same inferences as might be drawn by a jury.

under a contract of hiring to which he was party; and that if *Bailey* and *Potter*, being sued alone, had pleaded the non-joinder of *Clift* as a co-defendant, the plaintiff could not have succeeded upon a replication of a sole contract as to the last week of the journey. *Lewis* having joined *Bailey* and *Potter* in *January* 1838, it could hardly be contended that both *Clift* and *Lewis* were liable for the last week; yet it is not easy to perceive how *Clift*'s liability to *Wilson* could be got rid of by an arrangement between *Clift*'s late partners and *Lewis*, to which neither *Wilson* nor *Clift* were parties. If *Bailey*, *Potter*, and *Clift* had, in *November* 1837, ordered six casks of drugs to be delivered weekly, and the last delivery had taken place after 1st of *January* 1838, it is conceived that no action for goods sold and delivered would have lain against *Bailey*, *Potter*, and *Lewis* in respect of such last delivered cask.

Suppose, however, the contract of hiring to be severable, and that every day on which the traveller proceeded on his homeward journey, constituted a fresh hiring, a difficulty arises with respect to the form of the contract declared upon in the first count. One partner has an im-

plied authority to bind his co-partners by accepting a bill *bonâ fide* drawn for a partnership transaction, or a bill which a taker for value has reason to believe to be accepted by one partner in the name of the firm, with the authority of his co-partners. The latter case can hardly arise in the case of a partner unknown as well as dormant. The implied authority to accept bills *bonâ fide* drawn for a partnership transaction, is an authority to accept bills drawn *wholly* in respect of partnership transactions. An implied authority is not more binding than an authority which is express; and if *A.* authorise *B.* to accept in *A.*'s name a bill to be drawn upon *A.* for 1*l.* 15*s.*, in which sum *A.* is indebted, and *B.*, without the knowledge of *A.*, adds a debt of his own for 47*l.* 15*s.* 6*d.* to the 1*l.* 15*s.*, and accepts in *A.*'s name a bill for 49*l.* 14*s.* 6*d.*, it is conceived that in an action against *A.* as acceptor, he would not be liable to a verdict for 49*l.* 14*s.* 6*d.*, or even for 1*l.* 15*s.*, either upon a traverse of this acceptance, or upon a special plea setting out the facts, and not specially demurred to as amounting to *non acceptavit*, supposing such a demurrer could be supported.

In *Easter* term, 1839, *Talfourd* Serjt. obtained a rule calling upon the defendant to shew cause why the verdict found for him on the first issue should not be set aside, and instead thereof a verdict be entered for the plaintiff on that issue, for the amount of the principal and interest on the bill of exchange mentioned in the first count as for the sum of 1*l.* 15*s.*

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In this term *Stuart Wortley* shewed cause. The item of 1*l.* 15*s.* raises the question as to the liability for the hire of the horse and gig from the 1st to the 18th of *January*. (a) The plea to the first count shews that the bill was drawn in fraud of *Lewis*. [*Tindal* C. J. Suppose no bill had been drawn, who would have been liable?] The old partnership of *Bailey, Potter, and Clift*, were, it is submitted, liable for the whole.

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Another objection to the plaintiff's right to recover is, that he was himself a party to the fraud committed by *Bailey* in drawing the bill; as it appeared in evidence that the plaintiff was aware of the circumstances under which the bill was drawn. [*Maule* J. What issue is that material upon?] In *Sheriff v. Wilks* (b) it was held that a bill drawn upon *A, B, and C*, in respect of a debt due from *A* and *B* before the admission of *C* into the firm, and accepted by *A* and *B* in the name of the new firm, was fraudulent and void. [*Tindal* C. J. Should not *Lewis* have pleaded the fraud? *Bosanquet* J. Why did he not plead that he did not accept? *Tindal* C. J. As the record is framed, it was for the defendant *Lewis* to establish the whole of the plea.] The letter of 2d *June* shews that up to that time the plaintiff considered the old firm liable. Whilst taking a bill in the name of the new firm from *Bailey* in *February*, he must therefore have been aware that *Bailey* was pledging the new firm to a debt of the old concern. [*Tindal* C. J.

(a) *Vide supra*. 199. (a).

(b) 1 *East*, 48.

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It does not appear that on the 2d of *June*, when the letter was written, the plaintiff knew that *Lewis* had become a partuer on the 1st of *January*.] The defendant *Lewis* is not liable in respect of that part of the consideration which accrued before he became a partner, even if the court should consider him to be liable to the extent of any part of the consideration which accrued afterwards. But the contract was made with the old partnership; and *Lewis*, it is submitted, was not liable in any shape, or to any extent whatever. There is here no mutuality; for *Lewis* could not have sued *Wilson* for damages for not supplying good gigs and horses under a contract into which *Wilson* had entered on the 29th of *August* 1837; nor could *Lewis* have set off any debt owing from *Wilson* to the new partnership; *Wintle v. Crowther*. (a) [Maule J. Can it be said that the partnership authorised *Bailey* to bind *Lewis* by an acceptance for a debt for which *Lewis* was not previously liable?] The hiring was for the journey. It was not competent to *Wilson* to put an end to the hiring and demand the horse and gig back on the 31st of *December*; which shews that the contract was entire. [Maule J. In *Wintle v. Crowther*, Bayley B. says, "We are of opinion that where a partnership name is pledged, the partnership, of whomsoever it may consist, and whether the partners are named or not, and whether they are known or secret partners, will be bound, unless the title of the person who seeks to charge them, can be impeached." (b)] At all events, the defendant *Lewis* cannot be liable in respect of that part of the consideration of the acceptance which accrued before the 1st of *January* 1838. (He then attempted to distinguish the case from *Battley v. Lewis* (c) as to the relation of the

(a) 1 Cro. & Jerv. 316.; 1 Tyrwh. 210.

(b) 1 Cro. & Jerv. 319.

(c) *Antè*, Vol. I. 155.

partnership to the 1st of *January*, and cited *Vere v. Ashby (a).*)

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It is, therefore, submitted, first, that there is nothing in the evidence to shew that *Lewis* was a partner before the 16th of *January*, the day on which the partnership deed was executed; secondly, that supposing *Lewis* to have been a partner before the 16th of *January*, the contract in respect of which the bill was accepted was a contract between the plaintiff and *Bailey, Potter, and Clift*, and not between the plaintiff and *Bailey, Potter, and Lewis*; and, thirdly, that, at any rate, the plaintiff is not entitled to recover more than the 1*l.* 15*s.*

Talfourd Serjt. and Wightman, contra. There is no ground for charging the plaintiff with fraud. This was a case of secret partnership; and the plaintiff was entirely ignorant as to the time at which *Lewis* became a partner. Though the partnership deed was given in evidence, on the part of the defendant *Lewis*, it was not mentioned at the trial, that in that deed was contained a clause which provided that the old debts should be paid by the new firm. That clause gets rid of any question of fraud. But, independently of this equitable liability for the whole of the consideration of the acceptance, a strict legal liability was shewn to exist for a part of the consideration. There is a fallacy in supposing that there was one entire special contract of hiring, which covered the whole time of the use of the horse and gig. The contract was severable, as appears by the bill furnished by the plaintiff to *Bailey, Potter, and Co.*, and given in evidence at the trial (*b*); which shews that the mode of dealing was, by charging for the entire weeks, at 35*s.* per week, and at the same rate for the odd days.

TINDAL C. J. The question is, whether the plea was substantially made out by the evidence or not. The

(a) 10 *B. & C.* 288.

(b) *Suprà*, 198.

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verdict found that the allegations of the first plea were true. The plaintiff says that the finding is wrong, either in the whole or in part. Under the issue taken upon that plea, the defendant *Lewis* is bound to shew that the bill was accepted in respect of a debt contracted by *Bailey* and *Potter* before *Lewis* became a partner with them and not in respect of a contract relating to the partnership. The question is, whether, upon the evidence, the acceptance was for *any thing after* the commencement of the partnership, or for *all before*.

Now, upon the evidence, it appears that the real consideration for this acceptance is different from that set out in the plea. This partnership did exist at the time when part of the debt accrued, the bill in question having been accepted partly in consideration of the hire and use of a horse and gig in *January* 1838. *Lewis* therefore, was not justified in putting upon the record a plea in which it is represented that the whole of the consideration for the acceptance was a debt contracted before the commencement of the partnership between *Bailey*, *Potter*, and *Lewis*. That plea appears to me to be negatived by the evidence. (His Lordship then went on to shew that there was sufficient evidence for the jury of the partnership having commenced on the 1st of *January*.) The plea does not put this defence upon the ground of fraud, but relies upon an entire absence of consideration, which is not proved. I think there should be judgment for the plaintiff on the first issue; but that the damages should be limited to *l. 15s.*

BOSANQUET J. There was sufficient to shew that *Lewis* was a partner with *Bailey* and *Potter* from the 1st of *January* 1838. Though it may have been stipulated, between themselves, that *Lewis* was not to be liable for losses until the deed should be executed, yet, if by the agreement between them, he was entitled to

participate in the profits, he would be liable, to third persons, as a partner, in respect of debts incurred at a time when by a previous arrangement between the parties he was entitled to a share of the profits. The new firm was indebted to the extent of 1*l.* 15*s.* The evidence did not sustain the plea, which required it to be made out that *no part* of the consideration had arisen after the commencement of the partnership; and therefore the plaintiff is entitled to have a verdict entered for him in the first issue: but I agree in thinking that the course pointed out by my Lord Chief Justice is that which ought to be adopted.

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COLTMAN J. I am also of opinion that the first issue ought to have been found for the plaintiff, and that upon a very narrow ground. I am not prepared to say that any part of the debt which was the consideration of the acceptance was due from the new firm. *Clift* might have been sued for the whole 49*l.* 14*s.* 6*d.* But the allegation in the plea is precise, — that the bill was accepted by *Bailey* and *Potter* in respect of a debt contracted by them before the defendant *Lewis* became a partner with them, and not with respect of any contract relating to the partnership; whereas it appeared in evidence that the partnership commenced on the 1*st* of *January* 1838, and that a portion of the debt *became due* after that day. *Lewis* cannot, however, in justice or in reason, be called upon to pay the whole amount of the bill. I think, therefore, that the verdict will be properly entered on that issue for the plaintiff, with 1*l.* 15*s.* damages.

MAULE J. concurred.

Wightman then submitted, that if there had been judgment by default, the defendant would have been liable to the whole, notwithstanding a defence which he had omit-

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ted to plead. [*Tindal* C. J. We must look at the equity of the case.] If a bill is drawn during the partnership by one partner, in the name of the firm, all the partners are bound, unless fraud is pleaded and proved. [*Tindal* C. J. We are placed by the agreement of the parties, in the same position as the jury. We may therefore decide as the jury might have done. (a) Suppose the defendant *Lewis* had pleaded *non acceptavit*. If the verdict is not entered for the smaller sum, the defendant *Lewis* may amend his plea, and go to a new trial.] Upon this issue the defendant is not at liberty to give evidence in mitigation of damages; even payment would not be admissible. [*Maule* J. Can it be said that matters which would not be available in a defence to the action, are in no case receivable in mitigation of damages? *Bosanquet* J. Payment is expressly excepted. (b)] The defendant seeks to give matter in evidence in mitigation of damages, without pleading that matter. Upon a plea of the statute of limitations, if the defendant fail in establishing that defence, he can not, in mitigation of damages, go into want of consideration as to part. [*Maule* J. Put the case of judgment by default.] Two of the defendants have suffered judgment by default, and by so doing they have admitted themselves to be liable to the whole demand. [*Tindal* C. J. In the case of a reference to the master after judgment by default in an action upon a bill of exchange, would the master be bound to give the whole amount of the

(a) In *Barber v. Backhouse*, *Peake*, N. P. C. 91., it was held by Lord *Kenyon*, that in an action on a bill of exchange, between the immediate parties, where for a part of the sum expressed in the bill to be payable there was originally no consideration, the jury might

apportion the damages, although money had been paid into court upon the count on the bill. And see *Willes v. Freeman*, 12 *East*, 656.

(b) *Vide*, rule H. T. 4 W. 4. And see *Shirley v. Jacobs*, 1 *New Cases*, 88.; *Lediard v. Bucher*, 7 *Carr. & P.* 1.

bill, when he saw that the consideration extended only to half that amount?] The master could not receive evidence, by affidavit or otherwise, of that which might have been pleaded.

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TINDAL C. J. We ought not to assist the plaintiff to recover damages to which he is not equitably entitled. If he stands upon his strict rights there must be a new trial, with leave for the defendant *Lewis* to amend his plea. (a) The rule should be absolute for entering a verdict for the plaintiff on the special plea, damages 1*l.* 15*s.*

The plaintiff's counsel assenting to this arrangement,
Rule absolute accordingly. (b)

(a) The amendment would, probably, have been by pleading *non acceptavit*. It is conceived that there could have been no special answer by way of plea to part of the first count, in re-

spect of part of the consideration of the bill.

(b) And see *Kilmer v. Bailey, Lewis, and Potter*, 7 Dowl. P. C. 803.

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Where in a memorandum of charter, it is agreed that the ship shall proceed to *Quebec*, and there load from the factors of the freighter, a full cargo, *not exceeding what the ship can reason-*

ASSUMPSIT. The first count of the declaration stated, that on the 6th of *August* 1835, by a certain charter-party of affreightment (*a*) between the defendant, therein described as owner of the ship or vessel called the *Christopher*, whereof one *G. Kay* was master, then lying at *London*, of the one part, and the plaintiffs, therein described as of *London*, merchants, of the other part, it was, amongst other things, agreed that the said ship or vessel should, with all convenient speed, sail and proceed to *Quebec*, or so near thereunto as she

ably stow, the words in italics are merely a qualification upon the ship-owner's engagement to carry a full cargo, and not a substantive engagement on his part to stow the cargo in a reasonable manner.

Upon an issue whether a cargo (loaded on deck) is improperly loaded, *A.*, a witness called on the part of the plaintiff, to prove that the practice of stowing part of the cargo upon deck is dangerous, states, in answer to a question put to him on cross-examination, that it is usual for ships in the particular trade to carry deck-cargoes. *A.* may be asked, upon re-examination, whether it is not usual for the ship-owner to pay for deck-cargo washed or thrown overboard.

Upon an issue whether a deck-cargo was loaded at the request and by the order and direction of the freighter, proof that the superintendent of the freighter's warehouse, who delivered out the goods for shipping, was aware of and approved of the stowage of the cargo, does not support the affirmative of the issue.

A direction to a jury that *prima facie* the deck was not the proper place for stowing any part of the cargo, and that if it increased the danger of the ship, or of that part of the cargo, it is an improper stowage, was held to be correct, though it appeared that it had been usual to load deck-cargoes in the particular trade, but it also appeared to be usual for the ship-owner to bear the loss of deck-cargo washed or thrown overboard.

Where a declaration contains two inconsistent counts, and the defendant pays money into court upon the second count, which the plaintiff accepts, the defendant cannot read the second count and the proceedings thereon to the jury, as conclusive, or as any evidence to negative an allegation in the first count.

(*a*) A charter-party being an instrument under seal, an instrument in the nature of a charter-party, not under seal, is usually termed "a memorandum of charter."

might safely get, and there load from the factors of the plaintiffs a full and complete cargo of pine timber and deals, with staves for broken stowage only (the quantity of pine timber not to be less than half the cargo, the freighters to have the option of shipping forty loads of hard wood), not exceeding what she could reasonably stow and carry over above her tackle, apparel, provisions, and furniture; and being so loaded should there-with proceed to *London*, or so near thereunto as she might safely get, and deliver the same on being paid freight at the rate and in the manner in the said charter-party particularly specified; the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation only excepted; as by the said charter-party, reference being thereunto had, would fully appear. (Mutual promises and averment of general performance.)

First breach, that although the said ship or vessel did sail and proceed to *Quebec*, and it then became and was the duty of the defendant, in pursuance of the said charter-party, to load in and on board the said ship or vessel a full and complete cargo, not exceeding what the said ship or vessel could reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and to load such cargo in a good and sufficient, proper and careful manner, and to take due care of the same, and therewith to proceed to *London*, or so near thereunto as the said ship or vessel might safely get, according to the tenor and effect of the said charter-party. Yet the defendant, not regarding the said charter-party, or her promise in that behalf, did not nor would, after such arrival of the said ship or vessel at *Quebec* as aforesaid, load in and on board the said ship or vessel a full and complete cargo, not exceeding what she could reasonably stow and carry over and above

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&c., but, on the contrary thereof, then loaded in and on board the said ship or vessel a cargo much exceeding what the said ship or vessel could reasonably stow and carry, over and above, &c.

Second breach, that the defendant further disregarding, &c., after the arrival of the said ship or vessel at *Quebec* as aforesaid, loaded the said cargo, which had then been received from the factors of the plaintiff, in a bad, insufficient, improper, and careless manner, in this, to wit, that the defendant loaded a part of the said cargo, to wit, twenty-six pieces of timber, of the value of 50*l.*, respectively parcel of the said cargo, in and on board the said ship or vessel; whereby the said part of the said cargo became and was exposed to great and unnecessary risk and peril, and the plaintiffs were deprived of the power of causing an insurance to be effected against the perils of the sea in respect of the said part of the said cargo so loaded in and on board the said deck of the said ship or vessel as aforesaid.

Third breach, that the defendant further disregarding, &c., did not take due and proper care of the said cargo which the defendant, after the arrival of the said ship or vessel at *Quebec* as aforesaid, had loaded from the factors of the plaintiffs in and on board the said ship or vessel; but on the contrary thereof, took such little and bad care of the same, that by and through the mere default of the defendant, a large part of the said cargo, of the value of 50*l.*, was thrown overboard, and became and was wholly lost to the plaintiffs.

By reason of which several premises the plaintiffs have not only lost and been deprived of a large part of their said cargo, of the value of 100*l.*, but have also lost and been deprived of divers great gains and profits which they might and would otherwise have gained and received by the use of the said part of the said cargo, which became and was so lost as aforesaid.

The second count stated that the plaintiffs, before and at the time of the happening of the damages and losses in that count mentioned, were the owners of certain merchandize, to wit, twenty-six pieces of timber, then being in and on board a certain ship or vessel of the defendant, and laden and placed on the deck thereof, to be carried and conveyed therein on freight payable to the defendant on that behalf, for a certain voyage whereon the said ship or vessel was then proceeding, to wit, from *Quebec* to *London*; that before and at the time of the loading of the last-mentioned pieces of timber in and on board of the ship or vessel, there had been and was a certain *antient and laudable custom* used and approved of, touching and concerning the loading of timber in and on board ships and vessels trading between *Quebec* aforesaid and *London* aforesaid, and employed in carrying timber from *Quebec* to *London* aforesaid, that is to say, that the owners of such ships or vessels have had, and have been used and accustomed to have, and of right have had, and still of right ought to have, for themselves and their servants, the liberty and privilege of loading and placing on the deck of such ships or vessels a reasonable part of such timber as they from time to time respectively are employed to bring from *Quebec* to *London* aforesaid; that the said ship or vessel in that count first mentioned, at the time of the happening of the damages and losses in that count mentioned, was a ship or vessel trading between *Quebec* aforesaid and *London* aforesaid, and employed in carrying timber from *Quebec* aforesaid to *London* aforesaid, and that the twenty-six pieces of timber so laden and placed on the deck of the said ship or vessel, then were a reasonable part in that behalf of the timber which the defendant was then employed to carry in that voyage by the said ship or vessel from *Quebec* aforesaid to *London* aforesaid; and the said

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twenty-six pieces of timber were laden by the defendant on the deck of the said ship or vessel in pursuance of, and according to, the said custom; that whilst the mentioned ship or vessel was sailing and proceeding on her last-mentioned voyage with the last-mentioned merchandize on board, to wit, 1st *December* in the year aforesaid, by storms, winds, and tempestuous weather, in order to preserve the said ship or vessel, it became expedient and necessary to throw and cast overboard the said last-mentioned merchandize, so being the property of the plaintiffs, of great value, to wit, of the value of 100*l.*; and the same were then accordingly cast and thrown overboard, and became and were wholly lost to the plaintiffs: and the said ship or vessel was, by means of the premises then saved and preserved, and afterwards, to wit on the 31st of *December* in the year aforesaid, arrived safely at *London* aforesaid, of all which last-mentioned premises, the defendant afterwards, to wit on the day and year last aforesaid, had notice; and then, in consideration of the last-mentioned premises, promised the plaintiffs to pay them so much money as the defendant as owner of the said last-mentioned ship or vessel, and interested in the said freight, was liable to contribute to the said losses and damages in a general average, on request: averment: that the defendant, as such owner of the last-mentioned ship or vessel, and so interested in the said freight, was liable to pay and contribute to the said losses and damages in a general average, a large sum of money, to wit 20*l.*; whereof the defendant afterwards to wit on the day and year last aforesaid had notice; yet the defendant had disregarded her last-mentioned promise, had not paid the last-mentioned sum of money or any part thereof.

Third count, upon an account stated.

Pleas: First, to the whole declaration, non assumpsit.

Secondly, to the first breach, that the defendant did not load in or on board the said ship or vessel a cargo exceeding what the said ship or vessel could reasonably stow and carry, over and above, &c. *modo et formâ*; concluding to the country.

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Thirdly, to the first breach that the said cargo so loaded in and on board the said ship or vessel, was so loaded by the defendant at the request and by the direction, of the plaintiffs. Verification.

Fourthly, to the second breach, that the defendant did not load the said cargo, in a bad, insufficient, improper, or careless manner, in *modo et formâ*; concluding to the country.

Fifthly, to the second breach, that the defendant loaded the said cargo in manner and form as in the second breach was mentioned, at the request and by the order and direction of the plaintiffs. Verification.

Sixthly, to the third breach, that the defendant did take due and proper care of the said cargo; and that the same was not, nor was any part thereof, through the default of the defendant, lost to the plaintiffs *modo et formâ*; concluding to the country.

Seventhly, to the third breach, that the said part of the said cargo which was so thrown overboard as in the third breach mentioned, was necessarily and unavoidably so thrown overboard, owing to the dangers and accidents of the sea and navigation, and to stormy and tempestuous weather, and for the preservation of the said ship or vessel, and the residue of the cargo, *without this*, that the same was thrown overboard, by or through the default of the defendant, *modo et formâ*; concluding to the country.

The Plaintiffs joined issue on the first, second, fourth, sixth, and seventh pleas, and replied *de injuriâ* to the third and fifth; on which issue was joined. The eighth plea traversed the custom alleged in the second count,

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and the ninth plea the loading in pursuance of such custom. These pleas, together with the first plea (so far as related to the second count), and the eleventh plea to the second and third counts, were subsequently withdrawn, and in lieu thereof the sum of 29*l.* 6*s.* 6*d.* was paid into court in respect of the causes of action on the second count mentioned; and the sum so paid in was *taken out of court* by the plaintiffs.

Tenthly, to the second count, the defendant traversed the liability to contribute in general average in respect of loss or damage on timber laden on deck and cast overboard as in that count mentioned.

The plaintiffs demurred specially to the tenth plea and on which demurrer judgment was given for the plaintiffs in *Michaelmas* term 1837. (a)

Dec. 17, 18.
 1838.

At the trial before *Gurney B.*, at the sittings in *London* after *Michaelmas* term, 1838, the following facts appeared:

On the 3d of *October*, 1835, the *Christopher* arrived at *Quebec* in ballast. The timber for the *Christopher's* cargo was brought to the vessel in rafts from ponds above the city belonging to the plaintiff *Price*. When the hold was full, the captain applied to the superintendent of the ponds for timber for a deck-cargo, which was supplied accordingly by the superintendent. There was no distinct evidence that *Price* was aware that it had been so supplied.

On the 9th of *November*, the *Christopher* sailed from *Quebec*; an extremely heavy gale coming on upon the 21st of *November*, the vessel became disabled, and the principal part of the deck-cargo and some staves from the hold, were thrown overboard.

That plaintiffs' witnesses stated that deck-cargoes impeded navigation in the stormy weather usual in the

(a) *Gould v. Oliver*, 4 *New Cases*, 134.; 5 *Scott*, 445.

fall of the year; and that a deck-cargo could be insured only at a treble premium (a), and that many mutual insurance clubs did not admit of deck-cargoes.

The witnesses having, on cross examination, stated that it was usual, both on spring and fall voyages, to load timber on the deck, they were asked, on re-examination, whether deck-cargoes, shipped on fall voyages were at the risk of ship-owner or of the merchant.

This course of examination was objected to on the part of the defendant, on the ground that each case must depend upon the terms of the particular contract, and that the inquiry into which the plaintiffs purposed to enter, was irrelevant. The objection was overruled, and the witnesses stated that in the absence of a stipulation, sometimes introduced into charter-parties for a full cargo "*in and over all*," the ship-owner always pays for deck-cargo thrown or washed overboard.

The defendants' witnesses stated, that the timber shipped on the deck of the *Christopher* was a moderate deck-cargo; and that such a cargo rather assisted than obstructed navigation, and made a vessel safe and more sea-kindly.

The defendants' counsel then proposed to read the second count of the declaration and the subsequent pleadings, as an admission on the record, that the cargo had been properly stowed. This the learned judge held to be inadmissible; but gave the defendant leave to move to enter a nonsuit, if the court should consider the evidence admissible and conclusive.

The learned judge told the jury that it was for them to say, whether the stowage was such as to increase the perils of the navigation; that if it increased the danger to the ship, or the danger to that part of the cargo, it

(a) This difference would arise from the insecurity of the deck cargo itself, not from the insecurity which it occasioned to the ship.

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was an improper stowage, because it tended to the injury of the shipper of the goods.

His Lordship also stated that no direct communication with *Price* on the subject of a deck-cargo had been shewn ; but that there was direct evidence that the captain, after coming on shore on some supposed message, had gone to the pond and made an application to the superintendent for a deck-cargo, and that the superintendent had made more than one delivery to him of timber for a deck-cargo ; that the superintendent afterwards came on board and approved of the mode in which the deck-cargo had been stowed, and that the jury were to say whether *Price* had knowledge of there being a deck-cargo, and, if not, whether the superintendent who had delivered the cargo, was so situated with respect to *Price*, as that his knowledge and approbation should be considered as the knowledge and approbation of *Price*.

The attention of the jury was not called to the first breach ; nor was any observation addressed to them with respect to the allegation of special damage in not being able to effect an insurance.

The jury found a verdict for the plaintiffs, — that the cargo was insufficiently stowed, and that it was not with the knowledge of the plaintiffs. Damages, 10*l.* 9*s.* 9*d.*

Jan. 15.
1839.

In *Hilary* term, 1839, *Atcherley* Serjt. obtained a rule calling upon the plaintiffs to shew cause why the verdict found for them on the second, fourth, sixth, and seventh issues should not be set aside, and instead thereof a verdict entered for the defendant on those issues, or why a new trial should not be had between the parties, or why the entry of final judgment on the said verdict should not be stayed.

The grounds upon which the motion was made, as to entering a verdict for the defendant, or for a new trial, were — that evidence of payment by ship-owners of the value of deck-cargoes thrown or washed overboard had been improperly admitted — that the learned judge

had improperly refused to allow the second count and the plea and replication thereto to be read in evidence, to shew that the plaintiffs had admitted the custom of loading deck-cargoes, by receiving general average calculated in respect of timber so loaded; that the learned judge had misdirected the jury, in telling them that whatever the usage had been, yet if deck-loading increased the danger of the navigation, the practice was improper, and in not telling them that the knowledge and assent of the superintendent of the ponds was the knowledge and assent of the plaintiffs, whose agent he was in the transaction. The cases of *Ross v. Thwaites* (a), *Barkhorn v. Ripley* (b), *Da Costa v. Edmunds* (c), *Major v. White* (d), and *Abbott on Shipping* (e) were cited.

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The grounds of the latter part of the motion, which went to arrest the judgment, were, that of the breaches assigned in the first count the first two were bad, and the third immaterial. [*Tindal* C. J. I very much doubt whether the objection on the record ought not to have been taken at a prior stage. But let the rule go upon all the points.]

In *Easter* term last *Wilde* S. G. shewed cause. The rule is not correct in form. (g) May, 1840.

(a) 1 *Park Insurance*, 26.

(b) *Ibid.*

(c) 4 *Campb.* 142.

(d) 7 *Carr. & P.* 43.

(e) P. 355. 5th ed.

(g) The rule as to setting aside the verdict upon the second, fourth, sixth, and seventh issues appears to be correct: those issues did not relate, as it may possibly have been supposed, to the second, fourth, sixth, and seventh *pleas*. By the course of the pleadings, these numbers relate to the issues joined by

the plaintiff upon the second and sixth pleas, and by those joined by the defendant upon the replications to the third and fifth pleas. But, as the verdict was entered, that part of the rule which went to an arrest of judgment, should have been to stay judgment upon the verdict generally, and not upon the *said* verdict, i. e. the verdict upon the four issues mentioned in the previous part of the rule.

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The defendant contended at the trial, that she was at liberty to use the second count of the declaration, (to which count an entire end had been put by the course which had been taken upon the pleadings to that count,) as a statement made by the plaintiffs themselves, that there existed a laudable custom, that the owners of ships employed for carrying timber from *Quebec* to *London*, have had the liberty and privilege of loading and placing on the deck of such ships a reasonable part of such timber. The term custom, as used in that count, could only mean that that was the usual course of trade. (a) At the trial, the plaintiff said that there had been no custom, but a bad practice: a usage to drown men cannot be a good custom. The defendant, to shew her right to read the second count in proof of the custom, contended that there was no difference between so doing and producing a record between the same parties in another action; the defendant having asked the plaintiffs' witness, whether it was usual to stow timber on the deck, would *prima facie* be taken to mean whether that was the ordinary course in which case the risk would fall upon the shipper of the goods; but it was not usual for the shipper to take that risk, if the practice was for the ship-owner to indemnify him against a loss resulting from timber so stowed, being washed or thrown overboard: the answer therefore to the question put to the witness on cross-examination by the defendant's counsel would have led to a false inference, if the plaintiff had not been allowed, upon re-examination, to inquire at whose risk such deck-cargoes were carried. The question put upon cross-examination was put without reference to express stipulations in charter-parties,

(a) The custom is pleaded as *antient*, not as *immemorial*. It could hardly be meant as a custom in the strict legal sense; otherwise, upon a plea traversing the custom, the defendant

might have proved that *Quebec* had been founded in the seventeenth century, and had begun to trade with *London* in the eighteenth.

and, therefore, the plaintiffs had a right, and were bound to put their question as to the party by whom the risk was to be borne, in the same general terms. The plaintiffs' counsel had a right to ask who has borne a loss, if any has occurred, where there has been no stipulation, without producing any charter-parties, as it would have been useless to produce charter-parties which did *not* contain any stipulation with respect to such losses. The preamble of 2 & 3 *Vict. c. 44.* recites that "great loss of life and severe sufferings have been occasioned amongst the crews of ships and vessels laden with timber from *British* ports in *North America*, from the practice of having a portion of the cargo of such ships stowed on or above deck." It was contended, upon moving the rule, that the issue being, whether the cargo was properly loaded, it was irrelevant to inquire at whose risk it was loaded; but there can be no doubt that the question was relevant to that issue, with reference to the course of inquiry pursued by the defendant upon cross-examination. Then it is objected that the learned judge misdirected the jury with reference to the relation between the superintendent and *Price*; but it was expressly left to them to consider, whether the superintendent was so situated with respect to *Price* (being the person employed by *Price* to deliver the timber,) as that his knowledge and approbation were to be considered as the knowledge and approbation of *Price*. There was no evidence that the superintendent had any authority to consent to the mode of loading; no evidence from which it could be inferred that he was an agent. This part of the case, therefore, was left to the jury too favourably for the defendant. Then the defendant complains that the learned judge told the jury that the question for them to consider was, whether this was a proper mode of stowing, and that whatever the usage had been, deck loading was improper, if the danger to the ship, or to that part of the cargo,

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was increased by that mode of stowage. But the learned judge presented *this* part of the case to the jury in a mode favourable to the defendant, as he spoke of the custom which *had prevailed*, without adverting to the evidence of payment for losses of deck-cargoes by the ship-owner : he therefore gave the defendant the benefit of an *unqualified* custom. Then the defendant is mortified at having lost the benefit of concluding the plaintiffs by reading the second count ; but it is clear that one count or one plea in a nisi prius record cannot be used to answer another plea : *Harington v. Macmorris* (a), *Firmin v. Crucifix* (b), *Montgomery v. Richardson*. (c) As to the case of *Da Costa v. Edmunds* (d), the carboys of vitriol were loaded on deck for a special reason, being a highly inflammable substance. (e) The learned judge was substantially right in leaving it to the jury, that if the stowage of timber on the deck increases the danger of the ship, or increases the danger to that part of the cargo, in either case it is an improper stowage, because it tends to the injury of the shipper of the goods. Increasing the danger to the ship includes an increase of the danger of the loss of life. The plaintiffs are content to stand or fall on the laws laid down by the learned judge, that if the mode of stowing increased the danger, it was an improper and an illegal mode. The circumstance of the ship-owners paying for timber washed or thrown overboard, is conclusive to shew that

(a) 5 Taunt. 228.

(b) 5 Carr. & P. 98.

(c) *Ib.* 247.

(d) 4 Campb. 142.

(e) It is stated in the report that the vitriol "caught fire." That the escape of a large quantity of oil of vitriol, i. e. impure sulphuric acid (the substance usually packed in carboys), should be destructive to

ship and cargo, is very intelligible, but, from its intense oxygenation, it appears less capable of combustion than the sea itself. Other substances called "vitriol," as sulphate of zinc (white vitriol), sulphate of iron (green vitriol), sulphate of copper (blue vitriol), are not packed in carboys, and are neither inflammable nor dangerous.

in their opinion this mode of stowing was improper and illegal.

In arrest of judgment it has been suggested that the first breach assigned amounts to no breach of the defendant's contract, namely, of that part of the contract which states the obligations of a ship-owner; but it is a mutual promise or agreement between the two parties; the stipulation that the owner shall receive on board a full and complete cargo, not exceeding what the ship can conveniently stow and carry, if it throws an obligation upon one party more than the other, it is upon the defendant. Her ship being so loaded, is to proceed to *London, &c.*; nothing is to be done on the part of the shippers. [*Tindal* C. J. referred to *Marzetti v. Williams. (a)*]

Wightman, on the same side. There is no inconsistency, as has been supposed, between the two counts. In the first count the plaintiffs declare for the entire loss; in the second count they say that they are at least entitled to recover for part. [*Bosanquet* J. The objection on the part of the defendant is, that the plaintiffs have taken the money out of court. *Tindal* C. J. You never could expect to recover upon two inconsistent counts. *Bosanquet* J. Can you recover on both?] At all events this was no evidence for the jury; nothing is before them but the issue, as was observed in *Edmunds v. Groves. (b)* Suppose judgment had been suffered in this case by default, the objection would have been equally good; *Harington v. Macmorris. (c)* If the pleadings are not before the jury, but only the issue, it is absurd to say that the pleadings can be brought before them; *Firmin v. Crucifix (d)*, *Montgomery v. Richardson. (e)*

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(a) 1 *Barn. & Ad.* 415.(b) 2 *M. & W.* 642.(c) 5 *Taunt.* 228.(d) 5 *Carr. & P.* 98.(e) *Ib.* 246.

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In *Cornfoot v. Fomke* (a) it was held, that the misrepresentation of the house agent as to the character of the house, did not bind his principal. [*Erskine J.* That was a mere question of fraud.] As to the second count, if the plaintiffs were not entitled to enforce their claim under the first count, after taking the money out of court, the proper mode of raising the objection would have been, to apply to stay proceedings on the first count. As to the arrest of judgment the objection is higher, if it can be taken at all. In *Williams v. Mostyn* (b) it was held, that no action can be maintained against the sheriff for the escape of a prisoner in custody on mesne process, unless the plaintiff have sustained actual damage or delay of his suit thereby; but it is otherwise in an action on contract.

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Atcherley Serjt. in support of the rule. As to the improper reception of evidence, the great contest in this case was, whether loading of the deck-cargo was improper. The plaintiffs called witnesses to prove that a deck-cargo increased the risk. Those witnesses admitted that a practice had prevailed of carrying deck-cargoes, and they admitted that they themselves had given their approbation to this mode of stowage, which shews the practice; and it was contended, that it also shewed that approbation was necessary. The witnesses for the defendant stated, that where a deck-cargo was not excessive (and here there was no allegation of excess), it made a ship more *sea-kindly*. Evidence was produced to shew that when there was a deck-cargo, it was at the risk of the ship-owners. It was objected that this evidence was not admissible, because it was not *ad idem*, the issue being, whether the deck-cargo was rightly loaded. It was suggested that the evidence went to negative the cargo's being properly stowed. The

(a) 6 *M. & W.* 358.

(b) 4 *M. & W.* 145.

risk of jettison being greater, it might be reasonably agreed that the deck-cargo should be at the risk of the ship-owner, and there might be a special contract to that effect; or if there was none, the ship-owner might prefer paying such a sum as 5*l.* for timber which had been washed overboard, to suffering his vessel to be detained, or even to engaging in a law suit. [*Tindal* C. J. That goes rather to the *weight* of the evidence, than to its admissibility.] The legal liability of the ship-owner to pay for losses upon deck-cargoes, must depend upon the contract of the parties in each particular case. Proof of a *general* usage would be admissible, but it is submitted, there is no middle ground between the proof of general usage and proof of the contract of the parties in each individual case. The plaintiffs, therefore, were not at liberty to go into evidence of what had been done in particular cases, without proving the charter-party in each case upon which they relied. [*Tindal* C. J. The inquiry was introduced by questions put on the part of the defendant.] In *Kaines v. Knightly* (a), a verdict founded upon a verbal alteration in a written policy of insurance was set aside by the court. In *Cunningham v. Fonblanque* (b) it was ruled by *Parke* J., that a usage of trade must be proved by *instances*, and not by the opinion of witnesses; and a verdict in favour of the usage which had been proved by the opinion of witnesses only, was set aside by the court. [*Tindal* C. J. Does it not rather come from the other side to cross-examine and sift the evidence by which the usage has been proved generally.] Here, the question to which the evidence was directed was a question of fact, and the question at issue between the parties was a question of liability. [*Coltman* J. What was the use of the fact that cargoes had been stowed on deck, unless it appeared

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(a) *Skinner*, 54.(b) 6 *Carr. & P.* 44.

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whether that was a usual course, and whether it had been usual for the ship-owner to pay for losses upon timber so stowed. *Bosanquet J.* The defendant says it is usual to carry timber upon deck. The plaintiffs say that it is not usual so to carry *simpliciter*.] The 2 & 3 *Vict. c. 44.* takes notice of the existence of a practice of having a portion of the cargo stowed on or above deck. It cannot, therefore, be true that the plaintiffs were thereby prevented from effecting an insurance.

As to the improper rejection of evidence, the second count of the declaration states the existence of a laudable custom to load and place on the decks of vessels, a reasonable part of the timber brought from *Quebec* to *London*. The defendant does not rest her right to have this count submitted for the consideration of the jury, on the ground that it is contradictory to the allegations in the first count, but on the ground that a payment had been made on the second count which the plaintiffs had accepted. It is founded on the *conduct* of the plaintiffs and their own admission. Supposing such a payment had taken place in the plaintiff's counting-house, it could not have been pretended that the fact of payment, and the terms upon which the payment had been made, would not have been evidence upon a question between the parties arising out of the same transaction. Such payment and acceptance would be conclusive upon the rights of the parties. *Bosanquet J.* The statement of the custom in the second count would not be conclusive here, because the plaintiffs say, in the same breath, that they insist upon the first count. *Tindal C. J.* The declaration tries to get as much out of the defendant as it can.] Supposing the plaintiffs not to be concluded by the allegations in the second count, followed up by the payment and acceptance of the amount claimed under that count, still it was evidence for the jury. An ad-

mission of the party is evidence, whether made before or during the trial. The admission is not the worse for being on the record.

As to the misdirection, *Price* was resident at *Quebec*, three miles from the ponds. He had, on a former occasion, ordered a deck cargo to be put on board a vessel loaded by him. Under the circumstances, the knowledge of the superintendent was the knowledge of *Price*.

What adds to the risk is not necessarily an improper mode of stowing. In *Abbott on Shipping*, fifth edition, 355., it is said, "the *French* ordinance, in express terms, excludes from the benefit of general average, goods stowed upon the deck of the ship, [*Liv. 3. tit. 8. du Jet.*, art. 13. (a),] and the same rule prevails, in prac-

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(a) That article runs thus:— "Contribution shall not be demanded towards the payment for goods which were upon the deck, which are thrown overboard or damaged by jettison, saving to the owner, his remedy against the master; and they shall contribute nevertheless if they are saved." *Valin* (vol. ii. 203.) has the following note upon this article:—"This can only happen either because there was no room in the vessel to stow these goods elsewhere, or by the negligence of the master, who was bound to stow them properly; in either case it is his fault, he having no more right to overload his vessel than to expose the goods to the risk of falling into the sea, as a consequence to their bad situation. On this account it is that this article makes him responsible for the event to the shipper of the goods; and the forty-sixth article of the Ordinance of *Wisburg*, makes him responsible in

the same way to the owner in the event of overloading. This double liability falls on the owner of the ship, he being bound by the acts of his captain until he declares that he abandons the ship and freight according to *liv. 2. art. 2. tit. 8.* The reason why this article refuses compensation for goods on the deck, being damaged or thrown overboard is that, as they must necessarily embarrass the working of the ship, the presumption is that they were thrown overboard before any absolute necessity of so doing, and merely because they hindered and embarrassed the working of the ship. If, however, notwithstanding this, the master do not choose to throw them overboard, and they are damaged by the throwing overboard of the other goods, it follows, on the same principle, that the payment of the damage cannot form part of the mass of losses to be included in the general average,

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tice, in this country. Goods so stowed may, in many cases, obstruct the management of a vessel, and, *except in cases where usage may have sanctioned the practice*, the master ought not to stow them there without the consent of the merchant." In *Major v. White (a)*, it was held by *Parke B.*, that if the shipper of goods is warned as to the way in which they will be stowed, his consignee cannot maintain any action for damage sustained by bad stowage: here, the timber was shipped by the superintendent of the ponds, who made no objection to the mode of stowing.

In arrest of judgment it is submitted, that the first breach assigned, proceeds upon that which is not a true construction of the contract. The words "not exceeding what she could reasonably stow and carry," create a limitation in favour of the defendant upon her liability to carry a full and complete cargo, and not any engagement on her part.

Stephen Serj., on the same side. In order to ascertain whether improper evidence was admitted it will be necessary to look at the breach, which charges an improper loading by placing the timber on deck. It was proved, that not more timber was placed on the deck than the vessel could reasonably carry on her deck. When it was asked at whose risk the deck-cargo was, the question must necessarily be understood

inasmuch as payment for the loss of a part cannot be demanded under circumstances in which there would be no right to compensation for a total loss."

So the *Code de Commerce*, No. 421., directs that goods loaded upon the deck shall contribute to general average if they are saved, but shall not give their owner a right to contri-

bution if they are thrown overboard or if they are damaged by a jettison, leaving him to his remedy against the captain.

The remedy adverted to in No. 421. seems to be that provided by No. 229., which makes the captain liable for all damage to goods loaded upon the deck without the consent *in writing* of the party shipping them.

(a) 7 Carr. & P. 43.

as referring to particular cases in which an accident had arisen. The questions, therefore, put on the part of the plaintiffs, were not co-extensive with those put by the defendant. [*Tindal* C. J. The question is first put by the defendant. *Bosanquet* J. You did not ask if there was a special contract.] If the charter-parties had been produced, it must have appeared whether there was any special stipulation or not.

The learned judge misdirected the jury in telling them that they were not to consider the case with reference to the custom which had prevailed, and also in not telling them that the timber had been delivered out to the captain for the purpose of being loaded on deck, and that the superintendent, though not the general agent of *Price*, was his agent in delivering out the timber for the purpose of being so loaded. In *Churchill v. Day* (a) Lord *Tenterden* says, "It would be dangerous to say, that if money is paid into court, and, in the declaration, another count is found more accurately applicable to the plaintiff's cause of action, the effect of the payment should be defeated." Taking the money out of court makes all the difference. Suppose a second action brought for improper stowage, the defendant might give the record in this action in evidence. [*Tindal* C. J. That would be by way of estoppel. The difficulty here is, that you cannot look at different parts of the same record for the purpose of controlling one part by the other. *Trevivan v. Lawrance* (b) shews that the estoppel must prevail. The plaintiff here is estopped, by taking the money out of court, from denying that this is a proper mode of stowing. If the 29*l.* 6*s.* 6*d.* had been received before action brought, there could have been no question but that the plaintiffs would have been precluded from recovering upon the first count. They

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(a) 3 *Mann. & Ryl.* 71. (b) 1 *Salk.* 276.

1840. would be estopped by the fact of payment. [Erskine J.]

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Could you not have pleaded puis darrein continuance?]

There was no estoppel since the last continuance. The estoppel seems to meet the justice of the case. [Tindal C.J. Estoppels are not favoured.] They would not be allowed in law if they were not conducive to justice.

In arrest of judgment, it is submitted that no contract is stated, of which the breach assigned is a violation. The words, "not exceeding what she can reasonably stow and carry," have a totally different meaning from what the plaintiffs in their declaration suppose. They are merely a restriction upon the defendant's liability; *Hunter v. Fry*. (a) Then, the damages being entirely assessed upon all the breaches, if one breach be badly assigned, judgment must be arrested; *Cro. Eliz.* 685. (b) [Erskine J. Your argument is not addressed to the mode in which they answer this objection on the other side, that it is merely a defective statement.]

Richards R V. on the same side. Whether the cargo was properly stowed, must depend upon the way in which the parties have treated this mode of stowage. The fact of payment, if it had taken place before the action, would have been clearly a proper piece of evidence to lay before the jury. And it is submitted that it would have been conclusive evidence. It is a fallacy, in this case, to say that one count cannot be read against another. The defendant says, that the plaintiffs have, by their acts, treated this as a good loading.

Then upon the point of misdirection. It was a miscarriage on the part of the learned judge to say, that if the risk was increased, the mode of stowage was im-

(a) 2 Barn. & Ald. 421.

(b) Anonymous.

proper. . . Whether the risk is increased or not, the mode of loading cannot be improper if it be such as the custom allows. If the vessel was rendered unseaworthy, the underwriters would be discharged from all liability; but this is not pretended.

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As to the arrest of judgment, *Chadwick v. Trower* (a) shews, that as the damages are given generally, the judgment be arrested.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court. — Nov. 25.

This was an action of assumpsit on a charter-party made between the defendant therein described as the owner of the ship, called the *Christopher*, then lying at London, of the one part, and the plaintiffs therein described as merchants, of the other part, whereby it was agreed, that the said ship should sail with all convenient speed to *Quebec*, or as near thereto as she could safely get, and there load from the factors of the plaintiffs, a full and complete cargo of pine timber, and deals, &c., not exceeding what she could reasonably stow and carry over and above her tackle," &c.

The declaration assigned three breaches, first that the defendant would not load in and on board of the said ship a full and complete cargo not exceeding what she could reasonably stow and carry over and above her tackle, &c., but, on the contrary, "loaded on board the ship a cargo much exceeding what the said vessel could reasonably stow and carry over and above her tackle, &c.;" the second breach was for carelessly and improperly loading part of the cargo on the deck, whereby the plaintiffs were prevented from insuring; the third, for not taking proper care of the cargo, whereby it was lost. There was a second count for general average.

(a) 6 New Ca. 1.

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The defendants, as to the first count, traversed the several breaches therein assigned; and issue was joined thereon. The defendant also pleaded to the first and second breaches assigned, that the loading was by the order and direction of the plaintiffs; on each of which pleas an issue was afterwards taken. As to the second count, the defendant paid money into court, which money the plaintiffs took out of court in satisfaction of the damages alleged in the second count. At the trial, the jury found a verdict for the plaintiffs on the three breaches assigned, with general damages thereon. And the case comes before us, on a motion to enter a verdict for the defendant, on the second, fourth, sixth, and seventh issues, or for a new trial, on three grounds, viz.: first, the reception of evidence that was inadmissible; secondly, the rejection of evidence which ought to have been admitted; thirdly, the misdirection of the judge. There has also been a motion in arrest of judgment in case a new trial should be refused, upon the ground that the first breach alleged in the declaration is bad, inasmuch as it is not founded on any contract of the defendant contained in the charter-party, and that the damages being entire, the verdict for the plaintiffs cannot be supported. An objection was also taken to the second breach alleged in the declaration; but from the opinion we have formed as to the first breach, it becomes unnecessary to give any opinion thereon.

And upon the objection above stated in arrest of judgment, as to the first breach, we are of opinion that such objection ought to prevail. So much of the clause in the agreement as states that the ship shall load from the factors of the plaintiffs a full and complete cargo, is an agreement binding on the shipowner, and compelling the defendant to take a full and complete cargo on board, if procured by the factors of the freighters,

and ready for delivery on board at the proper time. But the condition thereto annexed, that it shall not "exceed what the ship can conveniently stow and carry," is a condition introduced solely and exclusively in favour of the defendant, the ship-owner, in order to limit and define the extent of the general terms, "a full and complete cargo." The plaintiffs could not bring any action against the defendant for not loading a full and complete cargo, if the latter could shew that no more of the ship was left empty than was sufficient to stow her tackle, apparel, provisions, and furniture. But, on the other hand, the clause does not contain any words obligatory on the defendant that the shipowner shall not load more than the covenant compelled, if the freighters required it and the shipowner assented to it. The captain and the crew might, by putting themselves to personal inconvenience, be able safely to load on board a larger cargo than the shipowner could be compelled to take; and such loading on board, if unattended with danger to the voyage or injury to the plaintiffs, could not be considered as a ground of action upon the breach of a condition, introduced entirely for the shipowner's security. In short, the words are *words of exemption* in favour of the defendant, and the plaintiffs desire them to be construed as *words of obligation* against the defendant. The first breach, therefore, we consider to be bad; and that, as the damages are entire, the judgment must be arrested; or, according to the doctrine laid down in the case of *Leach v. Thomas* (a), we think a *venire de novo* may be awarded: the Court of Exchequer having in this respect restored the practice which in former cases prevailed in this court.

Notwithstanding, however, our opinion on this point, the defendant has the right to require our judgment on

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(a) 2 M. & W. 427.

1840.. the other points which have been made in argument,
 — relating to a new trial; on which also this rule was
 GOULD moved.

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 OLIVER. At the trial, two questions were put by the judge to
 the jury; first, whether the timber was improperly
 stowed; and, secondly, if it was so, whether it was
 stowed with the knowledge and consent of *Price*, one of
 the plaintiffs. The jury found both questions in favour
 of the plaintiffs, viz., that the timber was improperly
 stowed, and that it was not stowed with the consent of
Price.

The main question between the parties being, whe-
 ther a shipowner in the *Canada* trade is authorised to
 stow a portion of his timber cargo on deck in the winter
 season, evidence was given, on the part of the plain-
 tiffs, to shew such a mode of loading to be highly dan-
 gerous. The defendant, on the other hand, called
 witnesses to shew that so far from being dangerous, it
 was rather advantageous to the voyage. The defendant
 further examined witnesses to prove, that such a course
 of loading was general in the *Canada* trade; upon which
 the plaintiffs inquired, at whose risk, in such cases, the
 deck cargo was brought home; and for the purpose of
 shewing, that when such a course was pursued, it was
 at the risk of the shipowners, the plaintiffs inquired
 whether the shipowners had not, in fact, paid for the
 loss when any loss had occurred.

This evidence was objected to, on the part of the de-
 fendant, on the ground that the risk must depend upon
 the contract between the particular parties, and, conse-
 quently, that the inquiry could only be answered by
 proof of the contract entered into in each particular
 case. It was proved, however, to be not unusual in
 this trade for the parties to insert in their charter-parties
 the words "in and over all," as descriptive of the cargo
 contemplated, when a deck-cargo was intended to be

loaded. And this having been proved, it was asked, which party, in the absence of any particular stipulation respecting a deck cargo, had, in point of practice, borne the loss, the shipper or ship-owner? This inquiry was objected to, but allowed by the judge; and we think it was properly allowed.

For, the object of proving the usage of trade to load a deck cargo went to establish, that the shipowner had not improperly stowed his cargo, and therefore that he was not responsible for the consequences of such mode of stowage: but if it were shewn, that where a loss had occurred under such circumstances, the shipowner had paid the owner of the goods the amount of such loss, it was strong evidence to shew that the practice, however common, of carrying a deck cargo, did not decide the question as to the liability of the parties; but, on the other hand, shewed that the owner by taking such a cargo, incurred a liability which did not belong to him in respect of the rest of the cargo. The payment of the loss was proof that he had acted in a manner not warranted by the usage of the trade.

The second objection was, that the judge ought to have allowed the second count, which was for general average, and which averred a stowage of the plaintiffs' goods according to the custom of trade, the plea thereon of payment into court to the amount of 29*l.* 6*s.* 6*d.*, and the replication, accepting the same in satisfaction, to be read as evidence, on the part of the defendant, that the cargo had been properly stowed according to the custom of the trade.

It was contended, that if the plaintiffs, out of court, had claimed a sum as due to them for general average, on the ground that their goods, after having been properly stowed, had been necessarily thrown overboard for the general safety of the ship and cargo, and that the plaintiffs had received the sum required, in satisfaction of

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their demand, it would have been evidence of an acknowledgment by them, that their goods had been properly stowed : and if so, the same circumstances could not be less evidence, because they were stated on the record.

But this argument, when examined, appears to us to be unsound.

A plaintiff, in setting forth the ground of his demand upon the defendant, is at liberty to state different claims upon the record, though inconsistent with each other, without subjecting himself thereby to have one of such claims set up as an answer to the other. Whatever issues are joined upon any counts or pleas are to be tried by the jury distinctly from each other. If not guilty, and a justification be pleaded to a declaration in trespass, the admission of the trespass in the justification will not entitle the plaintiff to a verdict on the plea of Not guilty.

It is contended, however, in this case, that taking the money out of court in satisfaction of the matter in the second count, was an *act* of the plaintiff apparent upon the record, of which the defendant was entitled to avail herself. But the answer is, — this part of the pleading was not before the jury.

In the case of *Montgomery v. Richardson* (a), where, to a declaration for false imprisonment, the general issue and several special pleas were pleaded, and a judgment upon demurrer to the special pleas had been given for the plaintiff, it was contended, that the plaintiff was entitled to read one of those pleas to the jury in support of the issue of Not guilty, because the jury were to assess the damages on the special pleas : but Lord *Tenterden* was clearly of opinion that he was not, because there could be no damage on the special pleas till the plaintiff had proved his case on the general issue.

(a) 5 Carr. & Payne, 247.

The effect of the pleadings in the present case is this: The plaintiffs claim a total loss upon their goods in consequence of the misconduct of the defendant, and in case they should fail in establishing such misconduct in the defendant, they claim a partial compensation for the sacrifice of their goods in the shape of general average.

The defendant, admitting the second claim, pays it into court, which the plaintiffs take out, having no claim, in this view, beyond the amount paid in. But, in so doing, they do not abandon the claim which they have preferred in the first count of the declaration; and upon which issues remain to be tried. They would not, indeed, be permitted to retain the whole amount of loss under the first count, and the amount of general average under the second; but they are not to be deprived of their right to insist, that a total loss has been sustained by the misconduct of the defendant.

The third objection is founded on certain alleged misdirections of the learned judge.

First. It is said that he ought not to have left it to the jury to decide whether, from the knowledge and approbation of the superintendent of the ponds, with respect to the loading of the cargo, the knowledge and approbation of the plaintiff *Price* were to be inferred; but, on the contrary, that he ought to have directed the jury that such knowledge and approbation were to be inferred therefrom.

We cannot, however, accede to this objection. The superintendent was not authorised by his employment as such, to bind the plaintiffs; and as to the fact of knowledge, *Price* lived at a distance of nearly three miles from the ponds. There is no reasonable ground, therefore, for the assumption that *Price* was necessarily acquainted with every thing that was known to the superintendent.

The next head of objection to the direction of the

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1840. — judge, is that he told the jury that if loading a deck
 cargo increased the danger of navigation, it was an im-
 proper practice, thereby, as it is said, excluding the
 consideration of usage, and making the increase of
 danger an absolute test of improper stowage.

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But the language of the learned judge must be viewed with reference to the case in proof before the jury.

If a particular mode of stowage be conformable to the established usage of trade, it may not be improper, although another mode of stowage may be more safe. In this case it was proved that the practice of stowing timber upon deck was very general; but it was also shewn, that where the cargo was so loaded and a loss occurred, the shipowner, in the absence of any stipulation to the contrary, had paid the amount of loss to the shipper; and no instance was given in which the loss had been sustained by the shipper.

It was further shewn, that insurances upon deck-cargoes could not be effected unless at a triple premium; and still further, that it was not unusual to insert a special clause in the charter-party, that the ship should have a deck load.

Primâ facie, the deck is an improper place for the stowage of the cargo of any part of it. The duty of stowing the cargo belongs to the master, and no evidence was given of a general custom to load a deck-cargo at the risk of the shipper. So far as the evidence upon this subject went, it shewed, that whenever a loss had occurred, it had been made good by the shipowner, and consequently that he had no right, by custom to throw the loss upon the shipper. The learned judge therefore told the jury, that they were not to consider the matter with reference to the custom, but with reference to the fact, whether the stowage was actually improper, that is to say, whether it was such as to increase the perils of that navigation.

The great body of the evidence on both sides, was directed to the question, whether the danger was increased or diminished by the stowage on the deck. The plaintiffs' witnesses stating the former, and the defendant's the latter.

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The question left to the jury was, whether the timber stowed upon the deck was properly or improperly stowed; the judge telling the jury, that if it increased the danger of the ship, or increased the danger to that part of the cargo, — in either case it was an improper stowage, because it tended to the injury of the shipper. It was finally left to them in the language of the issue, "Was this cargo improperly stowed?" (a).

The jury found that it was improperly stowed: and we do not think that the direction to the jury, under the circumstances of the case, to exclude from their consideration the evidence of the practice, was wrong.

For these reasons, we are of opinion that the defendant is not entitled either to enter a verdict for herself, or to have a new trial: but for the reasons we have

(a) And see 3 & 4 Vict. c. 36., (which is to continue in force till 1st May 1842,) whereby, after reciting "that great loss of life and severe sufferings have been occasioned amongst the crews of ships and vessels laden with timber and wood goods from British ports in America, from the practice of having a portion of the cargo of such ships stowed on or above deck," it is enacted, "that it shall not be lawful for any part of the cargo of any ship or vessel wholly or in part laden with timber or wood goods, and clearing from any British port in North America, or the Settlement of Honduras, for any port in the United Kingdom,

between the 1st day of September and the 1st day of May, in each year, to be stowed or placed, during any part of the voyage, upon or above the deck of such ship or vessel; and the captain or master of every ship or vessel so laden, and clearing from any British port in North America, or the Settlement of Honduras, for any port in the United Kingdom, between the said 1st day of September and 1st day of May in each year, shall not be permitted to sail without first procuring a certificate from the clearing officer that all the cargo is below deck."

Honduras is not mentioned in the former statute of 2 & 3 Vict. c. 44.

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before given, we think a *venire de novo* should be awarded.

Award of *venire facias de novo*. (b)

(b) As to the award of a *venire de novo*, see *Cook v. Cox*, 3 *Maule & Selw.* 110.; *Fisher v. Clement*, 1 *Mann. & Ryl.* 281.; 4 *Mann. & Ryl.* 128.(a); 21 *Vin. Abr.* 469.

The distinction between an award of a *venire de novo* and a rule for a new trial, appears to be, that the former is always founded upon some irregularity or miscarriage *apparent* upon the face of the record, whilst the latter is an interference by the court in the discretionary exercise of a species of equitable jurisdiction, for the purpose of relieving a party against a *latent* grievance. After a rule for a new trial and a new

trial had thereon, the record is in the same state as if no trial except the last had taken place; whereas, upon a *venire de novo*, the fact of the first trial, and the circumstances under which that trial became nugatory or abortive, and which rendered a second trial a matter, not of discretion, but of right, necessarily appear on the record; *vide Bishop of Exeter v. Gulley*, *coram* Lord Lyndhurst C. at *Lincoln's Inn Hall*, 25th July 1829, upon a motion in Chancery for an order for the issuing of a writ of diminution to the Court of Common Pleas. 5 *Mann. & Ryl.* 499. 505.

Port
640

CASES

1841.

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Hilary Term,

IN THE

FOURTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in banc during this Term were,

TINDAL C. J.

ERSKINE J.

BOSANQUET J.

MAULE J.

REGULA GENERALIS.

HILARY TERM, 4 VICTORIA.

IT IS ORDERED, that a party entitled to appear to a declaration in ejectment, may appear and plead thereto at any time after service of such declaration, and before the end of the fourth day of the term in which the tenant is required by the notice to appear, in town causes; and before the end of the fourth day after the term in which the tenant is required by the notice to appear, in country causes; and may proceed to compel the plaintiff to reply thereto, or may sign judgment of *non pros.*, notwith-

Appearance
to declara-
tion, in eject-
ment.

1841. — standing such plaintiff may not have obtained a rule for judgment on such service of declaration; and that a plaintiff who may have omitted to obtain a rule for judgment within the time prescribed by the present rules and practice, shall be entitled, on production of such plea, to an order of a judge for leave to draw up a rule for judgment as of the time at which such rule for judgment would have been obtained.

(Signed)	DENMAN.	J. PATTESON.
	N. C. TINDAL.	J. GURNEY.
	ABINGER.	J. WILLIAMS.
	J. LITTLEDALE.	J. T. COLERIDGE.
	J. PARKE.	T. ERSKINE.
	J. B. BOSANQUET.	W. H. MAULE.
	E. H. ALDERSON.	R. M. ROLFE.

1841.

TURNER v. DIAPER.

Jan. 13th.

DEBT, for work and labour done to houses belonging to the defendant. Pleas : first, never indebted, except as to 37*l.* 6*s.* 8*d.* ; secondly, as to 36*l.* 3*s.* payment before action brought ; thirdly, as to 1*l.* 3*s.* 8*d.*, payment into court. The plaintiff joined issue on the first and second pleas, and took the 1*l.* 3*s.* 8*d.* out of court.

At the trial before the undersheriff of the county of *Warwick*, the defendant met the plaintiff's case by proving an agreement to do the work for 40*l.* ; and that he had paid the plaintiff, before action brought, 36*l.* 3*s.* on account, which, with the 1*l.* 3*s.* 8*d.* paid into court, amounted to 37*l.* 6*s.* 8*d.* In order to cover the balance, 2*l.* 13*s.* 4*d.*, the defendant called a witness who proved that the defendant had employed him and another man to do the spouting to the houses, and had paid each of them 1*l.* 6*s.* 8*d.* This evidence was objected to on the part of the plaintiff, on the ground that the 2*l.* 13*s.* 4*d.* should have been pleaded as a set-off. The undersheriff inclined to that opinion, but received the evidence ; and a verdict was found for the defendant, with leave for the plaintiff to move to enter a verdict for 2*l.* 13*s.* 4*d.*, or for a new trial.

Goulburn Serjt. now moved accordingly. The question is, whether the evidence of the work done by the defendant was admissible, without being pleaded. [*Tin-*

Where a person is employed to do certain work for a certain sum, and part of the work is afterwards done by the employer, the amount of the latter work is matter, not of set-off, but of deduction.

Where, therefore, in debt for work and labour, the defendant pleaded, never indebted except as to 37*l.* 6*s.* 8*d.*, payment of 36*l.* 3*s.* before action, and payment of 1*l.* 3*s.* 8*d.* into court, and the plaintiff joined issue on the first and second pleas, and took the 1*l.* 3*s.* 8*d.*

out of court, and at the trial the defendant proved an agreement to do the work for 40*l.*, and that he had paid 36*l.* 3*s.* on account, independently of the 1*l.* 3*s.* 8*d.* paid into court, and to cover the balance, 2*l.* 13*s.* 4*d.*, he proved that he had employed workmen to finish the work, and had paid them the last-mentioned sum ; — it was held, that the evidence was admissible under the plea of never indebted, and that the 2*l.* 13*s.* 4*d.* could not be pleaded as a set-off.

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dal C.J. In an action for work and labour, the defendant, under the plea of *nunquam indebitatus*, may shew that the work never was done. *Maule* J. How can it be said that the money paid by the defendant was on account of the plaintiff, if it was not for work which the plaintiff should have done? *Erskine* J. Otherwise the payment would be irrelevant, even if there were a plea of set-off.] The case of *Graham v. Partridge* (a) shews that a set off must be pleaded; and it is submitted that the claim set up by the defendant for the 2*l.* 13*s.* 4*d.* paid by him on account of the plaintiff, is clearly the subject of a set off. [*Bosanquet* J. Suppose the defendant had not paid the 2*l.* 13*s.* 4*d.*; the plaintiff, not having completed his job, would not have been entitled to recover that sum.]

TINDAL C.J. I think that this case is governed by *Cousins v. Paddon*. (b) It was there held, that where there is a special contract for goods to be furnished, or work to be done, at a fixed price, and the declaration consists of the common counts in debt on simple contract, for goods sold and delivered, and for work and labour, to which the defendant pleads that he never was indebted, he may prove (since the new rules of pleading, as he might have done before,) that the goods delivered were not of the quality contracted for, or that the work was done in an improper manner. That seems to me to be precisely the same case as this.

BOSANQUET J. I am of the same opinion. The fact that the defendant *paid* the 2*l.* 13*s.* 4*d.* may be entirely thrown out of consideration.

(a) *Tyrwh. & G.* 754., 1
Mees. & Welsb. 395., 5 *Dowl.*
P. C. 108.

(b) 5 *Tyrwh.* 535., 2 *Crompt.*
Mees. & Rosc. 547., 4 *Dowl.*
P. C. 488.

ERSKINE J. It being proved that the plaintiff undertook to do the work for 40*l.*, and that, with the money paid into court, he had received 37*l.* 6*s.* 8*d.*, in order to entitle him to a verdict, he was bound to shew that he had done work exceeding the latter amount. He proved that he had done a certain quantity of the work contracted for, and the defendant proved that he had left a part of it unfinished. The question then was, what was the full value of the work which had been performed. That was shewn by the sum of 2*l.* 13*s.* 4*d.* paid by the defendant to the workmen employed by him to complete the contract; which, being deducted from 40*l.* the stipulated price, left 37*l.* 6*s.* 8*d.*, — the amount which the plaintiff had received. As to the sum of 2*l.* 13*s.* 4*d.*, therefore, the defence clearly was, not in the nature of a set-off, but that the work was not done.

MAULE J. I also am of opinion, that this was not a case of set-off. The evidence offered by the defendant went to shew that he never was indebted beyond the 37*l.* 6*s.* 8*d.*

Rule refused. (a)

(a) And see *Hayselden v. Staff*, 5 A. & E. 153.; 6 Nev. & M. 659.

As the plaintiff in the principal case insisted, not that the defendant was not entitled in any shape to the benefit of the 2*l.* 13*s.* 4*d.* paid to his workmen, but that this payment ought to have been pleaded as a set-off, it must be taken that he assented to the spouting being

done by the defendant. If before the plaintiff had been guilty of any default, the defendant had *prevented* the plaintiff from performing this part of his contract, by officiously doing the work himself, either against the will, or without the knowledge, of the plaintiff, the defendant would have remained liable to pay the whole 40*l.*

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Jan. 11.

THOMAS SMITH v. WILLIAM CALDWALL
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A declaration stating "that in consideration that *A.* had, at the request of *B.*, advanced 24*l.* to *C.*, and that *A.* would advance to *C.* the further sums of 2*l.* per week for so long a period as *C.* should require, and also such other sums of money as *C.* should, from time to time, require, *B.* promised to repay him as well the 24*l.*, as the further

sums of 2*l.* per week, and such other sums as *A.* should lend and advance to *C.* as aforesaid," is not supported by a letter in which *B.* writes to *A.*, "I beg that you will continue to advance the sum of 2*l.* per week to *C.*; and I hereby engage to repay you all moneys you may advance to him, in addition to the 24*l.* which you have already let him have at my request."

But the variance may be amended by the judge at the trial, under 9 *G.* 4. c. 15., if not under 3 & 4 *W.* 4. c. 42. s. 23.

Where, upon such an amendment being made, the defendant submits to pay the sums recoverable under the amended declaration, he will be entitled to his costs from the time at which he might have paid money into court; but if he contests the plaintiff's right to recover any thing, and fails, he will be entitled only to the costs occasioned by the misdescription of the contract.

(*a*) As to the unnecessary allegation of a request, where the consideration is executory, see *antè*, Vol. I. 265. (*b*).

ASSUMPSIT. The declaration stated, that before the making of the promise of the defendant thereinafter next mentioned, the plaintiff, at the request of the defendant, had lent and advanced to one *Robert Bass* a certain sum of money, to wit, 24*l.*, and thereupon afterwards, to wit, 6th of *April* 1837, in consideration of the premises, and also in consideration that the plaintiff, at the like request of the defendant (*a*), would lend and advance to the said *Robert Bass* the further sums of 2*l.* per week for so long a period as the said *Robert Bass* should require the same, and also such other sums of money as the said *Robert Bass* should from time to time require, he, the defendant, promised the plaintiff to repay to him as well the said sum of 24*l.* so theretofore lent and advanced as aforesaid, as the said further sums of 2*l.* per week, so long as the plaintiff should continue so to lend and advance the same to the said *Robert Bass*, and such other sums as the plaintiff should lend and advance to the said *Robert Bass* as aforesaid.

Averment : that the plaintiff, confiding in the said promise of the defendant, did afterwards, for and during the space of divers, to wit, seven weeks, and after the making of the said promise of the defendant as aforesaid, lend and advance to the said *Robert Bass* the said sum of 2*l.* per week (as and when the said *Robert Bass* required the same), in addition to the said sum of 24*l.* so theretofore lent and advanced as aforesaid, amounting together to a large sum, to wit, the further sum of 14*l.*, and did also then, to wit, on the day and year aforesaid, lend and advance to the said *Robert Bass* a further large sum of money, to wit, 138*l.* 6*s.* 9*d.*; and although a reasonable time in that behalf had long since elapsed, yet the said *Robert Bass* had not, although he was afterwards, to wit, on the 1st day of *January* 1839, requested by the plaintiff so to do, as yet paid to the plaintiff either the said sum of 24*l.*, or any part thereof, or the said several sums of 14*l.* and 138*l.* 6*s.* 9*d.*, or either of them, or any part thereof, but had wholly neglected and refused so to do; of all which several premises respectively the defendant afterwards, to wit, on the day and year last aforesaid, had notice; yet that the defendant had not paid to the plaintiff either the said sum of 24*l.*, or any part thereof, or the said several further sums of 14*l.* and 138*l.* 6*s.* 9*d.*, or either of them, or any part thereof (although he was afterwards, to wit, on the day and year aforesaid, requested by the plaintiff so to do), but had wholly neglected and refused so to do; and that the said several sums of 24*l.*, 14*l.*, and 138*l.* 6*s.* 9*d.* respectively were still wholly due and unpaid. The declaration also contained counts for money paid, for interest, and upon an account stated.

Pleas : first, non assumpsit; secondly, a set off, for money paid, for money had and received, for interest, and upon an account stated; thirdly, to the second count, payment and acceptance, in satisfaction.

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1841. The replication joined issue upon the first plea, and
 ——— took issue on the second and third pleas ; whereon
 SMITH issue was also joined.
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At the trial before *Coltman J.*, at the sittings at *Guildhall*, after *Trinity* term 1839, the following letter, addressed by the defendant to the plaintiff, and signed by the defendant, was put in by the plaintiff.

Mincing Lane, 6th April 1839.

“ Sir, — I beg you will continue to advance the sum of 2*l.* per week to Mr. *Bass* ; and I hereby engage to repay you all moneys which you may advance to him, in addition to the 24*l.* which you have already let him have, at my request, to this date.”

No evidence was given in support of the claim for 138*l.* 6*s.* 9*d.* mentioned in the first count of declaration.

It was objected by *Talfourd Serjt.*, for the defendant, that the contract, proved by the letter, did not support the declaration ; the true meaning of the contract, as proved, being that the defendant should repay such moneys as the plaintiff should advance to *Bass* at the rate of 2*l.* per week, and not, that the defendant should be answerable for whatever amount *Bass* might require, as stated in the declaration. The learned judge was of opinion, that there was a variance between the declaration and the proof ; but he allowed the declaration to be amended, by striking out the words in italics. A verdict was found for the plaintiff, damages 38*l.*, the learned judge giving leave to the defendant to move to enter a nonsuit, if the court should be of opinion that it was not competent to him to make the amendment.

Talfourd Serjt. having, in *Michaelmas* term 1839, obtained a rule nisi to enter a nonsuit,

F. Gunning (with whom was Sir *F. Pollock*) now shewed cause. First; the contract is, in substance, truly stated in the declaration, according to its legal effect. The words, "all moneys you may advance to him," extend to all moneys which the plaintiff might advance to *Bass*, whether forming part of the 2*l.* per week or not. [*Tindal* C. J. The letter must be construed according to the apparent intention of the writer. The engagement to repay is connected with the request to advance 2*l.* per week. It would be absurd to hold, that a liability to an unlimited amount was contemplated by these parties. The promise, as laid in the declaration, is wider than the engagement contained in the letter.]

Secondly; if a substantial variance did exist, it was amendable under 3 & 4 *W. 4. c. 42. s. 23.*, which empowers the judge "to cause the record, writ, or document upon which any trial may be pending before him, when any variance shall appear between the proof, and the recital or setting forth on the record, of any contract, in any particular or particulars in the judgment of such judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action or defence, to be forthwith amended by some officer of the court or otherwise." Here, the defendant could not be prejudiced in the conduct of his defence by reason of the amendment. He went into his defence in respect of the 14*l.* and 24*l.*, which remained on the record after the amendment had been made, as fully as he could have done if those sums had originally been the only sums sought to be recovered. Any further preparation which he may have made for the purpose of resisting the claim for the 138*l.* 6*s.* 9*d.* (which was withdrawn by the amendment), would have raised merely a question of costs, a matter over which the statute gives the judge a large discretionary power. Besides which, the defendant might have relieved himself by bringing the

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1841. two sums of 24*l.* and 14*l.* into court. [*Maule* J. The defendant could not pay money into court without admitting (a) the special contract containing an unlimited guarantee, as set out in the declaration.] In *Stansbury v. Matthews* (b), though it was considered doubtful whether the amendment had been properly made, the court refused to interfere, because it was not shewn, by affidavit, that the defendant had a good defence to the declaration as amended, with which he was not prepared at the trial. In *Duckworth v. Harrison* (c), it was distinctly laid down by *Parke* B., that where the twenty-third section of 3 & 4 *W. 4. c. 42.* uses the words "by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence," the defence meant is, the defence at *nisi prius*, and not the general defence of the cause; and that, therefore, it was no objection to an amendment, that the mistake had led the defendant into a demurrer. In *Hanbury v. Ella* (d), the same learned judge says, "and I may observe that if such amendments were not permitted, there would be an end of the benefit of those new rules for pleading laid down by the judges, which proceed on the assumption that, by the said act of 3 & 4 *W. 4. c. 42. s. 23.*, the powers of amendment at the trial, in cases of variance, in particulars not material to the merits of the case, *are greatly enlarged.*" (e) In *Baker and Another, Assignees, v. Neaver* (g), an amendment was made by adding the name of the official assignee as a co-plaintiff. In *Morris v. Evans* (h), a

(a) *Vide Attwood v. Taylor*, ante, Vol. I. 279, 280.

(b) 7 *Dowl. P. C.* 23.

(c) *Ibid.* 463.

(d) 1 *A. & E.* 61.; 3 *Nev. & M.* 438.

(e) In practice, the benefit derived from amendments is wholly incommensurate with the inconvenience which results

to the parties from being restricted to a single count or plea.

(g) 1 *Dowl. P. C.* 616. That was the case of an application to the court to amend, upon a refusal by a judge at chambers, after the 9 *G. 4. c. 15.*, and before the 3 & 4 *W. 4. c. 42.*

(h) *Ib.* 657. This was also before the latter statute.

declaration for the disturbance of a right of ferry was amended by adding two counts varying the termini, and the description of the persons liable to pay the toll, after the cause had been taken down to trial, and the record withdrawn. In *Doe dem. Marriott v. Edwards* (a), Parke J. allowed a mistake in the name of the parish to be amended at nisi prius, although the ejectment was brought for a forfeiture, the action not being defended on the ground of variance. In *The Mayor and Burgesses of Carmarthen v. Lewis* (b), in assumpsit, for the use and occupation of "standings, market places, and sheds," the defendant pleaded non assumpsit; at the trial, the plaintiffs produced an agreement for a demise of tolls to the defendant. Parke B. allowed the declaration to be amended by inserting the word "tolls" (c), the plaintiffs paying the costs of the amendment. *Jacob v. Kirk* (d), *Howell v. Thomas*. (e)

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Talfourd Serjt. (with whom was *Swann*), *contra*. It has not been denied that between the contract stated in the declaration and the letter put in to prove that contract, there was a difference, not in terms only, but in substance. It will, therefore, be only necessary to advert to the last point, — whether the amendment was within the statute. The power to amend extends to those cases only in which there is a variance not material to the merits, and by the amendment of which the opposite party is not prejudiced. The cases which have been cited on the part of the plaintiff apply to the latter point only.

(a) 6 Carr & P. 208.

(b) *Ib.* 608.

(c) It was objected that a corporation could not maintain assumpsit for the use and occupation of tolls, tolls being an incorporeal hereditament. The objection is said to have been

overruled, on the ground that use and occupation will lie for tithes. *Tamen quære*, whether, even at the suit of an individual, assumpsit will lie for either tolls or tithes. .

(d) 2 Mood. & Rob. 221.

(e) 7 Carr & P. 342.

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It is clearly material to the merits of the case to determine, whether the contract between the parties is such as to limit the extent of the liability to 2*l.* per week, or whether it is an unlimited engagement. It is objected that there is no affidavit; but a plaintiff ought not to be encouraged to declare in such a manner as to give himself a chance of recovering that to which he is not entitled. The plaintiff must have known that he had no right to claim the 138*l.* 6*s.* 9*d.* from the defendant. *Ward v. Pearson.* (a) [*Tindal* C. J. The statute of 9 G. 4. c. 15., which is still in force, does not restrict the power of amending to those cases only in which the defect to be amended is not material to the merits.] That statute also speaks of variance “not material to the merits of the case.” [*Maule* J. Those words occur in the recital, but are not repeated in the enacting clause. If the declaration, as originally delivered, contained two counts, it is not certain that the defendant would have applied to strike one of them out.]

TINDAL C. J. I am of opinion that there was a variance between the contract set out on the record, and the letter produced to prove it. But I think that the defect was amendable under the statute of 9 G. 4. c. 15. The question is, upon what terms the amendment should be made? We should see that no additional expense is thrown upon the defendant by the amendment. If the defendant had said “I never came to contest your right to the 38*l.*,” he would have been entitled to the costs from the time at which, if he had known the extent of the plaintiff’s demand, he might have paid money into court. But that was not the case; for after the claim to recover the 138*l.* 6*s.* 9*d.* had been abandoned on the part of the plaintiff, the defendant still went

(a) 5 *M. & W.* 16.; 7 *Dowl. P. C.* 382.

on to contest his liability to pay the 14*l.* and the 24*l.* I think the rule ought to be discharged as for a nonsuit, but that the defendant should be allowed such costs as shall appear to the master to have been caused by the mis-statement of the contract in the declaration.

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BOSANQUET J. There is a variance between the allegation on the record and the letter produced; but it is a variance which ought to be amended under the 9 G. 4. c. 15. Consider in what a condition the plaintiff would be, if we were to hold that he is not entitled to have the amendment made. He has misconstrued the language of the defendant's letter, in supposing that the defendant has guaranteed the repayment of all the money which the plaintiff should advance, in addition to the 24*l.*, and has not restricted his further liability to 2*l.* per week only; the defendant, on the other hand, saying that the legal effect of the engagement into which he has entered is, that he should only pay so much additional money as the plaintiff should advance to *Bass* at the rate of 2*l.* per week. The plaintiff being prevented, by the new rules of pleading, from putting more than one count upon the record, he must either give up his claim for the 138*l.* 6*s.* 9*d.*, to which he considers himself entitled, or, if he declares for the 176*l.* 6*s.* 9*d.*, he must, upon the construction put upon the letter by the defendant, and approved of by the court, fail altogether, unless this amendment be allowed. (a) The guarantee must have

(a) If the plaintiff, instead of attempting to construe the defendant's letter, had set it out, either *in hæc verba* or by way of recital, the assignment of a breach of guarantee in not paying the 138*l.* 6*s.* 9*d.*, would have entitled the plaintiff to recover that sum, if his construction of the letter had been adopted by the court, and,

on the other hand, would have been rejected as surplusage, if that construction had been considered to be untenable. No question of variance would then have arisen; and the plaintiff would, it is conceived, have been safe as to the 24*l.* and the 14*l.*, in whatever light the claim for the 138*l.* 6*s.* 9*d.* might have been viewed.

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been perfectly well known to the defendant. The plaintiff has proved part of his demand, and ought not to be turned round because he has sought to recover a sum to which the defendant's engagement does not extend.

ERSKINE J. This was a case in which I am of opinion the judge had power to amend, and in which I think he acted rightly in directing the amendment. The defendant knew, or had the means of knowing, what the contract was upon which he was sought to be charged. If the defendant, on the abandonment of the claim for the 138*l.* 6*s.* 9*d.* at the trial, had admitted his liability to pay the 24*l.* and the 14*l.*, I think he would have been entitled to his costs up to that time; but he chose to proceed, disputing his liability to pay any thing. This shews, that in originally defending the action, the defendant meant to contend that he was not liable to pay any part of the money advanced by the plaintiff to *Bass*.

MAULE J. I think that the rule which my Lord Chief Justice has proposed will have the effect of doing justice between these parties. By the declaration, which could only be founded upon a written contract, the defendant had warning that he was sued upon that which might, under the 9 G. 4. c. 15., if not under the 3 & 4 W. 4. c. 42. s. 23., become the subject of an amendment. The power of amending under 3 & 4 W. 4. c. 42. s. 23., is given by way of substitution for the right to have two or more counts upon the same cause of action; and I think the parties should be placed in the situation in which they would have been if the declaration had contained two counts, and the verdict upon one had been for the plaintiff, and upon the other for the defendant.

Talfourd Serjt. asked for the costs of the application.

TINDAL C. J. The costs of this rule ought not to fall on the defendant. They are virtually costs immediately incidental to the amendment.

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Rule discharged as to the entering of a nonsuit, — the defendant to be allowed such costs as were occasioned by the misstatement of the contract.

LAMBURN v. CRUDEN.

January 21.

ASSUMPSIT, for work and labour. Plea: non assumpsit.

At the trial before *Tindal C. J.*, at the *London* sittings after *Hilary* term, 1839, the following facts appeared:

The plaintiff had been a superintendent of packets in the service of the *Star* Steam Packet Company, and the defendant was the chairman of the board of directors of that company. The plaintiff's salary was payable quarterly. The last year of his service expired on the 29th of *September* 1837, and his salary up to that time had been duly paid. Before the 29th of *September* 1837, the plaintiff wrote to the secretary of the company a letter, in which he refused to receive any orders from the chairman of the board of directors, unless they were in writing. On the 20th of *October* the plaintiff sent a letter to the secretary, tendering his resignation, which was not accepted until the 13th of *December*. The plaintiff performed no service for the company after

A servant is engaged at a yearly salary, payable quarterly. A month after the termination of one of the years of the service, the servant tenders his resignation. After another month the resignation is accepted, nothing being said about remuneration. for the time elapsed since the termination of the last year's service. The law implies no

engagement to pay for the services performed since the last quarter.

It was held, however, that, under the circumstances, it ought to have been left to the jury to say, whether the parties had come to an agreement that those services should be paid for.

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the 29th of *September* 1837, except upon one occasion, when he went on board one of the company's packets to inspect her, but the servants had received orders not to attend to his directions.

The particulars of the plaintiff's demand stated that the action was brought for money due for his services between the 29th of *September* and the 13th of *December*. The Lord Chief Justice nonsuited the plaintiff, on the ground that after shewing a yearly hiring and a rescinding of that contract, the plaintiff was not entitled to salary *pro ratâ*; but he directed the jury to find what the services from the 29th of *September* to the 13th of *December* were worth. The jury found that the plaintiff's services for that period would be worth 24*l.* 10*s.* The Lord Chief Justice gave the plaintiff leave to move to set aside the nonsuit, and enter a verdict for that sum.

A rule *nisi* having been obtained in the alternative, for setting aside the nonsuit and entering a verdict for the plaintiff, or for a new trial (*a*),

Shee Serjt. now shewed cause. Where a servant rescinds the contract of hiring, he is not entitled to receive any wages under the contract so rescinded. *Spain v. Arnott* (*b*), *Huttman v. Boulnois* (*c*), *Turner v. Robinson*. (*d*) The plaintiff (who was, in truth, dismissed from the service) was chargeable with misconduct, which would be an answer to the action. *Ridgway v. Hungerford Market Company*. (*e*) In *Thomas v. Williams* (*g*), which will perhaps be referred to for the plaintiff, the parties came to an express agreement that the plaintiff should be paid, *pro ratâ*, for his bygone services.

(*a*) *Antè*, p. 239.

(*b*) 2 *Stark. N. P. C.* 256.

(*c*) 2 *Carr. & P.* 510.

(*d*) 6 *Carr. & P.* 15. 5 *B.*
 & *Ad.* 789. 2 *Nev. & M.* 829.

(*e*) 3 *Ad. & Ell.* 171. 4

Nev. & M. 797. *Harr. & Woll.* 244.

(*g*) 1 *Ad. & Ell.* 685. 3

Nev. & M. 545.

Here, the parties have come to no such understanding. There the plaintiff recovered, not on the original contract, but upon the substituted agreement. The assessment, by the jury, of the value of the plaintiff's services is nugatory, the plaintiff being entitled to no remuneration for any services performed by him. Where freight *pro ratâ itineris* is claimed, it must be shewn that the partners have, in fact, come to a new agreement.

If the court should be of opinion that this was a case in which the jury might infer the existence of a new contract, all that the plaintiff would be entitled to ask for, would be a new trial.

Atcherley Serjt., in support of the rule. This is a case where the parties dissolved their contract by mutual consent; and the question is, whether that does not let the plaintiff in to claim *pro ratâ*. [*Tindal* C. J. Nothing is said at the time about the bygone services.] Where the parties dissolve a special contract, a right of action arises upon an implied general contract, although nothing be stated at the time. [*Tindal* C. J. If the plaintiff had tendered a resignation of his employment, *sub modo*, the master might have refused to accept such a resignation.] If at the time of the dissolution of the contract, the plaintiff had taken a security for his bygone services, such security would have been valid. *Thomas v. Williams.* (a) What the parties really contemplated was, that they should be placed in the same situation as if no special contract had existed. [*Tindal* C. J. What do you say of the letter of the 20th of October? *Maule* J. Suppose the onerous part of the service was to be performed in the winter, and the parties quarrelled at the beginning of the winter, and put an end to their special contract without saying any thing about wages.] At all events it

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(a) 1 *Ad. & Ell.* 685.; 3 *N. & M.* 545.

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ought to have been submitted to the jury, as a question of fact, whether the parties did or did not come to a substituted agreement. [*Erskine J.* In *Thomas v. Williams* it was left to the jury to say, whether the contract had been dissolved by the consent of the parties, with a direction from the learned judge to find for the plaintiff, if they should be of that opinion.]

TINDAL C. J. No new contract arises, by implication of law, upon a simple dissolution of a special contract of hiring and service, in respect of services performed under such special contract previously to its being so dissolved. But we think that there ought, in this case, to be a new trial, in order that it may be submitted to the consideration of a jury, whether the parties did or did not come to any new agreement in respect of the services performed subsequently to the 29th of *September*, and that such new trial should be without payment of costs on either side.

Per Curiam.

Rule absolute accordingly. (a)

(a) And see *Duncomb v. Tickridge, Alleyn.* 94.

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ASSUMPSIT, upon a memorandum of charter of the *Pomona*, *Smith*, master, whereby it was agreed that the ship, being tight, staunch, and strong, and every way fitted for the voyage, should, having liberty to load a cargo of coals out, either to *Venice* or *Trieste*, or both those ports, proceed to *Trieste*, and there load a complete and full cargo of wheat or other lawful merchandize, the merchants finding mats for dunnage, if required, if the vessel should load coals on the ship's account; the cargo to be addressed to the charterer's agents, which the merchants bound themselves to ship, not exceeding what the said vessel could reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and that the said vessel being so loaded, should therewith proceed to a good and safe port in the United Kingdom, calling at *Cork* or *Falmouth* for orders, or so near thereunto as she might safely get, and deliver the same, on being paid freight at and after the rate of 9s. per quarter for wheat, with 10 per cent. thereon for primage, and other goods in fair proportion thereto, restraints of princes and rulers during the said voyage always excepted: That the cargo should be sent alongside and taken from alongside the said vessel at the expenses and risk of the said freighters: That the freight should be paid on unloading and right delivery of the cargo, one half in cash, and the remainder by approved bill at two months' date: That forty running days should be allowed the said merchants, if the

By a memorandum of charter it is agreed: — that a vessel shall proceed to *Trieste*, and there load a full cargo, and being so loaded shall proceed to a port in the United Kingdom, and deliver the same, upon payment of freight at a certain rate; that forty running days shall be allowed the merchants (if not sooner dispatched) for loading at *Trieste*, and for unloading at the port of discharge; and twelve days on demurrage, at 6l. per day; the vessel to sail from *England* on or before the 4th of *February* next — and that the vessel shall be addressed to the charterer's agents at the port of loading and discharge: Held, that the sailing on or before the 4th of *February* was a condition precedent.

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ship were not sooner dispatched, for loading the said ship at *Trieste* and unloading at her port of discharge, and twelve days on demurrage over and above the said laying days, at 6*l.* per day: *The vessel to sail from England on or before the 4th of February then next*: That the vessel should be addressed to the charterer's agents at the ports of loading and discharge: That the cash for the ship's disbursements should be advanced free of interest or commission: And that the penalty for the non-performance of the said agreement should be 800*l.* Mutual promises, and general allegation of performance. Breach: that no agent, or other person on behalf of the defendants, for the loading of the said vessel could be found by the said master, nor had any such agent or other person been appointed by the defendants: and further, that the defendant did not, nor would, within the number of days in the charter-party mentioned in that behalf, nor did nor would any other person or persons on the behalf of the defendants, within the said last-mentioned number of days, load the said vessel with a full and complete cargo of wheat or other lawful merchandize, according to the tenor and effect of the said charter-party, and of their promise and undertaking; but, on the contrary thereof, wholly neglected and refused to load the said vessel with any cargo or merchandize whatsoever: and the plaintiff further saith, that by reason of the premises, the said vessel was detained for a long space of time, to wit, for the space of twenty days after the said lay days and days of demurrage in the said charter-party mentioned, whilst the said master was endeavouring to procure another cargo; and that by reason of the said defendants' not having been ready to load the said ship, and not having appointed or provided any agent or other person for the loading of the said vessel, the plaintiff was put to great charges and expenses, amounting, to wit, to the sum of 100*l.*, in and about inquiring and ad-

vertising for the said agents: and the plaintiff further saith, that by reason of the defendants' not having provided any cargo or merchandize whatsoever as aforesaid, the plaintiff not only lost and was deprived of all the profit and advantage which he might and otherwise would have made by the freight and primage of the said cargo so agreed to be loaded by the defendants as aforesaid, amounting to a large sum of money, to wit, the sum of 2000*l.*; but was also put to great charges and expense, amounting to a large sum of money, to wit, the sum of 1000*l.*, in and about the master of the said vessel endeavouring to procure, and procuring, another freight in the stead of the said freight so agreed to be provided by the defendants as aforesaid: and the plaintiff further saith, that by reason of the premises, and by reason of freights having fallen in value between the arrival of the said ship and the expiration of the said lay days, the freight so provided by the said master as aforesaid was of much less value, to wit, 450*l.* less value than the freight so agreed to be provided by the defendants as aforesaid; and that by reason of the premises the plaintiff had been put to great expense, and sustained great loss and inconvenience.

The defendants pleaded, *inter alia*, that although the said vessel was required by the said charter-party to sail from *England* on or before the 4th day of *February* next after the making of the said charter-party, yet the said vessel did not sail from *England* on or before the said 4th day of *February*; but, on the contrary thereof, the said vessel remained and continued in *England*, without the leave or licence, and against the will, of the defendants, for a long time after the said 4th day of *February*, to wit, until and upon the 22d day of *February* in the year aforesaid. Whereupon the defendants then refused to perform and fulfil the said charter-party, as they lawfully might do, for the cause aforesaid. Verification.

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Replication, that the said vessel, during the time she remained in *England* after the said 4th day of *February*, as in the last plea mentioned, was detained by contrary winds, and that the said vessel did not remain in *England* after the elapsing of the time during which the vessel was so detained as aforesaid; and the plaintiff further saith that the expiration of the said time at which the said vessel set sail was before any refusal by the defendants to fulfil or perform the charter-party, and as soon after the said 4th day of *February* in the last plea mentioned as was practicable in that behalf; and that the time which elapsed after the said 4th day of *February*, and before the sailing of the said vessel as in the said last plea mentioned, did not hinder the said vessel from proceeding to and arriving at *Trieste* within a reasonable time in that behalf, but that the said vessel proceeded on her said voyage with such dispatch as to arrive at *Trieste* within a reasonable time after the said 4th day of *February* as is in the declaration in that behalf mentioned, and before other vessels which had sailed from *England* before the said 4th day of *February*; *without this* that the time which elapsed after the 4th day of *February*, before the sailing of the said vessel from *England*, was a long and unreasonable time, in manner and form as in the last plea in that behalf alleged; concluding to the country.

Special demurrer, shewing for cause,—that inasmuch as the replication professes to contain a special traverse, the inducement thereof ought to have contained, and to have constituted, a sufficient answer, in substance, to the said last plea; yet, that in fact it contains and constitutes no such answer, inasmuch as the detention of the said vessel by contrary winds was not provided for or admitted by the said charter-party as an excuse for the non-performance of the said charter-party by the said plaintiff; nor is it material to the merits of this suit, whether the said vessel arrived at *Trieste* within a rea-

sonable time after such detention, or whether the said vessel arrived at *Trieste* before or after any other vessels which had sailed from *England* before the said 4th day of *February*; and also that the said replication is further defective in this, that the conclusion thereof contains no direct or formal traverse or denial of any material allegation contained in the said last plea; and also that the said replication is further defective in this, that the inducement thereof amounts to a pleading in confession and avoidance of the said last plea, inasmuch as it admits the allegation contained in the said last plea, to wit, that the said vessel did not sail from *England* on or before the said 4th day of *February*, and attempts to avoid the same by affirming that the said ship was detained by contrary winds; and also that the said replication is further defective in this, that it attempts to put in issue a matter wholly immaterial and irrelevant to the merits of the cause, inasmuch as the terms of the said charter-party in the said declaration mentioned provided absolutely that the said vessel should sail from *England* on or before the said 4th day of *February* next after the making thereof, and such sailing thereof was made a condition precedent to the performance of the said charter-party by the said defendants, for the fulfilment of which the said plaintiff bound himself absolutely, and made the same the essence of the contract with the said defendants; and also that the said replication is further defective in this, that it does not in any manner traverse, or confess and avoid, any of the material allegations contained in the said last plea. And also that the said replication is uncertain, inasmuch as it does not appear thereby what it is intended to answer, or how it is applicable to the said last plea, or what connection the arrival of the said vessel at *Trieste* within a reasonable time after its detention by contrary winds, or its arrival at *Trieste* before other vessels, has with the merits of

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this cause, or with the due fulfilment of the said charter-party as made and set forth by the said plaintiff: And also that the said replication is further defective in this, that it traverses, and attempts to put in issue, a matter not alleged in the plea which it professes to answer, inasmuch as it is not alleged in the said last plea that the time which elapsed after the 4th day of *February*, before the sailing of the said vessel from *England*, was a long and unreasonable time; and the said replication, by reason thereof, contains no traverse of, and has no reference to, the said plea.

Shee Serjt. in support of the demurrer. The replication is admitted to be bad. The court will therefore have to decide upon the validity of the plea; which depends on the question, whether the engagement on the part of the plaintiff, that the vessel should sail from *England* on or before the 4th of *February*, is to be considered as a condition precedent. [*Tindal* C. J. Suppose the wind was directly contrary.] In *Shadforth v. Higgin* (a) the freighter had engaged to provide a cargo at a port in *Jamaica*, in time for the *July* convoy, "provided she arrived out and was ready by the 25th of *June*." It was held by Lord *Ellenborough* C. J. that the arrival of the vessel by the 25th of *June*, was a condition precedent to the obligation to provide any cargo. In *Shubrick v. Salmond* (b), the defendant covenanted that the vessel should proceed from the port of discharge in *Madeira*, to *Wynyard*, in *South Carolina*, directly as wind and weather would permit after the discharge of the outward cargo. The charter-party contained a clause releasing the plaintiff from the obligation to provide a cargo at *Wynyard*, in case the

(a) 3 *Campb.* 385. *Sed vide*
Deffell v. Brocklebank, 4 *Price*,
 42, 43.

(b) 3 *Burr.* 1637.

ship should not arrive there by the 4th of *March*. The declaration assigned a breach in not arriving at *Wynyard* on the 4th of *March*, or at any time afterwards; to which the defendant pleaded, that it was impossible, after the discharge of the cargo, to arrive at *Wynyard* by the 4th of *March*. It was held, upon demurrer to this plea, that, the defendant's engagement that the ship should proceed to *Wynyard* was an *absolute* engagement. In *Granger v. Dent* (a), upon a proviso in a charter-party, that if the ship did not arrive at her port of loading on or before a certain day, unless prevented by stress of weather or other unavoidable impediments, the freighter should not be obliged to provide a cargo; it was held, that if ordinary diligence were used to reach the port of loading, the case was within the exception, though the causes by which the ship was detained might, by extraordinary exertion, have been overcome. There, unless the arrival of the ship before the particular day had been held to be a condition precedent, it would have been unnecessary to consider whether the case fell within the exception. [*Maule J.* In *Granger v. Dent* the verdict for the defendant would have been wrong, supposing the stipulation not to amount to a condition precedent.] *Soames v. Lonergan* (b), *Stavers v. Curling* (c), *M'Andrew v. Adams* (d), *Ritchie v. Atkinson* (e), *Havelock v. Geddes* (g), *Davidson v. Gwynne* (h), all shew that this is a condition precedent. [*Maule J.* It will be said that if the sailing on the 4th of *February* is a condition precedent in this case, the sailing within a reasonable time would also have been held to be a condition precedent. There is a difficulty in

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(a) *Moo. & Malk.* 475.;
Lloyd & Welsby, 270.

(b) 2 *B. & C.* 564.; 4 *D.*
& *R.* 74.; *Abbott, Law of*
Shipping, 5th ed. 195., 6th ed.
250.

(c) 3 *New Ca.* 355.

(d) 1 *New Ca.* 29.

(e) 10 *East*, 295.

(g) 10 *East*, 555.

(h) 12 *East*, 381.

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saying that one is to be a condition precedent and not the other.]

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Bompas, Serjt. *contra*. No authority has been adduced which proves this to be a condition precedent. All the cases cited shew that it is not. None of the stipulations which precede and follow the clause in question can be contended to create a condition precedent. In *Sharforth v. Higgins* the terms of the proviso made it a condition precedent. *Soames v. Loneragan* and *Shubrich v. Salmond* are in favour of the plaintiff. The leading case upon this point is *Constable v. Cloberie* (a), where it was held that a breach of the covenant to sail with the first wind was no answer to an action for freight. This principle was acted upon in *Boone v. Eyre* (b) and in *Freeman v. Taylor* (c), *Bornman v. Cooke*. (d) In *Hale v. Cazenove* (e), the opinion of the judges is directly in point: *Ritchie v. Atkinson* (g), *Davidson v. Gwynne*. (h) The clause requiring the vessel to be ready to sail on a certain day is introduced for the benefit of the shipper. So, in *Fothergill v. Walton* (i), where the ship-owner covenanted with the freighter to take on board six pipes of brandy at *Hâvre de Grace*, and to proceed to *Terceira*, and there take on board a complete cargo of fruit; it was held that, though this amounted to a covenant on the part of the freighter to ship the brandy at *Hâvre*, yet that such engagement did not create a condition precedent. A covenant is not a condition precedent, because it is prior in point of time to other stipulations. In *Stavers v.*

(a) *Palmer*, 397.; *antè*, 18.;
and see 1 *Wms. Saund.* 320. b.

(b) 1 *H. Bla.* 273. n.; 2 *W. Bla.* 1312.

(c) 8 *Bingh.* 124.; 1 *M. & Scott*, 182.

(d) 1 *Campb.* 377.

(e) 4 *East*, 476.

(g) *Suprà*, 263.

(h) *Ibid.*

(i) 8 *Taunt.* 576.; 1 *B. Moore*, 630.

Curling (a) it was laid down very strongly by the court that the terms must be precise to create a condition precedent.

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Stee, Serjt. in reply. The owner is not bound to wait from day to day, and look to his remedy by action against the freighter. The authorities cited for the plaintiff are all cases in which the parties had put their own construction upon the agreement. [*Tindal* C. J. That observation can hardly apply to those cases, in which the agreement was by deed: *Davidson* v. *Gwynne*. (b)] This is not a case of a deed. In *Abbott on Shipping* (c), it is said, "If either party is not ready at the time appointed for the loading of the ship, the other may seek another ship or cargo, and bring an action to recover the damages he has sustained."

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court :

The question raised upon this record is, whether the clause contained in the charter-party set out in the declaration, viz. : "the vessel to sail from *England* on or before the 4th day of *February* next," is a condition precedent on the part of the ship-owner, upon the non-compliance wherewith on his part, the defendants, the freighters, were at liberty to throw up the charter. The defendants, in their plea, have treated the clause as importing a condition ; alleging in such plea that the vessel "did not sail from *England* on or before the said 4th day of *February*, but, on the contrary, remained and continued in *England*, without the leave and against the will of the defendants, for a long time after ; whereupon the defendants refused to perform and fulfil the said charter-

(a) *Suprà*, 263.

(b) *Ibid.*

(c) 5th ed. 179., 6th ed. 232.

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party, as they lawfully might ;” and the plaintiff, having demurred to this plea, the question on the legal construction of the charter-party is thereby raised.

Whether a particular clause in a charter-party shall be held to be a condition, upon the non-performance of which by the one party, the other is at liberty to abandon the contract, and consider it at an end ; or whether it amounts to an agreement only, the breach whereof is to be recompensed by an action for damages, must depend upon the intention of the parties to be collected, in each particular case, from the terms of the agreement itself, and from the subject matter to which it relates. (a) “ It cannot depend,” as Lord *Ellenborough* observes, “ on any formal arrangement of the words, but (must depend) on the reason and sense of the thing as it is to be collected from the whole contract :” see *Ritchie v. Anderson*. (b) And looking, in the first place, at the terms of this agreement, we think some distinction must have been intended by the contracting parties, between this particular clause and those which precede and follow it, as to the nature of the obligations thereby respectively created. All the clauses of the charter-party, both prior and subsequent to the clause in dispute, are framed strictly and properly in the language of agreement only. The charter-party states, “ it is mutually agreed between the parties, *that* the ship being tight, &c., shall proceed to *Trieste*, and there load a complete cargo ; that the said vessel being so loaded shall there-with proceed to a good and safe port in the United Kingdom ; *that* the cargo shall be sent alongside ; *that* the freight shall be paid in the manner therein stipulated ; *that* forty running days shall be allowed the merchants.” And then is interposed the clause now under discussion, viz. : “ the vessel to sail from *England*

(a) And see *antè*, Vol. I., 851.

(b) 10 *East*, 295.

on or before the 4th day of *February* next." After which, the charter-party continues in the same frame as before: *That* the vessel shall be addressed to the charterers' agents, &c. Referring, therefore, in the first place, to the variation between the language of the particular clause, and that of the clauses amongst which it is found, there is reasonable ground for surmising, that some distinction must have been intended between them; and no other distinction can exist, except that the one set of clauses sounds in agreement, and the other clause, in condition.

The very words themselves, "*to sail* on or before a given day," do, by common usage, import the same as the words "*conditioned* to sail," or "*warranted* to sail on or before such a day;" and, undoubtedly, if in the middle of a common bought and sold note, for a cargo of corn, or any other goods, were found the words, "to be delivered on or before such a day," they would be held to amount to a condition; and the purchaser would not be bound to accept the cargo, if not ready for delivery by the day appointed.

And looking at the subject matter of the contract, without regarding the precise words, we think that construing the words as a condition precedent, will carry into effect the intention of the parties, with more certainty, than holding them to be matter of contract only, and merely the ground of an action for damages.

Both parties were aware that the whole success of a mercantile adventure does, in ordinary cases, depend upon the commencement of the voyage by a given time. The nature of the commodity to be imported, the state of the foreign and home market at the time the contract of charter-party is made, and the various other calculations which enter into commercial speculations, all combine to shew, that dispatch and certainty are of the very first importance to their success; and certainly

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The present case appears to us to be distinguishable from those cited on the part of the plaintiff, in both the particulars to which we have adverted; viz. that in this case the form of the stipulation is more nearly in the language of condition than in that of agreement, whilst in the cases cited the stipulation is in the language of covenant only; and again, that in this case the performance of the stipulation goes more to the very root and the whole consideration of the contract. And, indeed, in most or all of those cases, the objection has not been taken until after the voyage had been performed, nor, in many cases, until after the goods had been accepted; so that, it is manifest, the breach of the agreement of which the defendant complained, and which he sought to set up as the non-performance of a condition precedent, could not go to the whole of the consideration of the contract.

Such was the case of *Constable v. Cloberie* (a), where the ship-owner covenanted, that his ship should sail with the first fair wind; the case of *Bornmann v. Tooke* (b), where the covenant was, that the ship should sail with the first favourable wind; and the defence in each was set up against a demand for the freight, after the ship had performed her voyage and the merchant had accepted the cargo: so likewise in *Davidson v. Gwynne* (c), the covenant to sail with the first convoy was held not to be a condition precedent, the voyage being in fact performed; and so of the rest.

Upon the whole, therefore, we think the intention of the parties to this contract sufficiently appears to have

(a) *Palmer*, 397. *Noy*, 75.;
Abbott, L. S. 191.; *antè*, 18.

(b) 1 *Campb.* 377.

(c) 12 *East*, 381.

been, to insure the ship's sailing at latest by the 4th of *February*, and that the only mode of effecting this is by holding the clause in question to form a condition precedent; which we consider it to have been.

Judgment for the defendant.

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EVERETT and Another, Assignees of C. A. COLLIS, a Bankrupt, v. WELLS and Others.

ASSUMPSIT. The declaration stated, that the defendants, before *C. A. Collis* became a bankrupt, were indebted to him in 168*l.* 17*s.* 11*d.* for money had and received to his use, and on an account stated.

Plea, by way of set-off, that *C. A. Collis* the bankrupt, before he became a bankrupt, was indebted to the defendants in 203*l.* 10*s.* upon and by virtue of a certain judgment which they the defendants, on the 26th of *November* 1838, had recovered against him.

Replication, that the judgment in the plea mentioned, and upon which *C. A. Collis* became indebted, was and is a judgment obtained, recovered, and entered up by the defendants against the said *C. A. Collis*, upon and by virtue of a certain warrant of attorney executed by the said *C. A. Collis* and by one *W. Collis*, that is to say, a certain warrant of attorney signed, &c. by the said *C. A. Collis* and the said *W. Collis*, and duly executed by the said *C. A. Collis* and the said *W. Collis*, after the passing of the 3 G. 4., intituled "An act for preventing frauds upon creditors, by secret warrants of attorney to confess judgments," and after the 29th of *September* in the said act mentioned, and after the 11th of *January* 1832, to wit, on the 29th of *August* 1833,

Under the 3 G. 4. c. 39. s. 1, 2., a warrant of attorney is not valid as against the assignees of a bankrupt, unless it be filed, or judgment be signed upon it, within twenty-one days after its date.

So, although the petitioning creditor's debt was not contracted until after the expiration of the twenty-one days.

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whereby the said *C. A. Collis* and *W. Collis* authorized one *E. S. B.* and one *J. B.*, attorneys of the court of King's Bench, to appear for them, or either of them, &c. in the same court, in or as of *Trinity* term then last, &c., and then and there to receive a declaration for them the said *C. A. Collis* and *W. Collis*, or either of them, &c. in an action of debt for the sum of 200*l.* for so much money borrowed, at the suit of the now defendants, or at the suit of the survivors, &c., and thereupon to confess the same action, or else to suffer a judgment by *nil dicit* or otherwise to pass against the said *C. A. Collis* and *W. Collis*, or either of them, &c. in the same action, and to be thereupon forthwith entered up against them the said *C. A. Collis* and *W. Collis*, or either of them, &c. of record of the said court for the said sum of 200*l.* with full costs of suit; and which said warrant of attorney was also subject to a certain defeazance written and indorsed thereon, bearing date the day and year last mentioned, whereby it was declared that the same warrant of attorney was given for securing from the said *C. A. Collis* and *W. Collis*, or either of them, &c. the payment unto the defendants, or the survivors, &c. of the sum of 100*l.*, with interest for the same, at the rate, &c.; and that it was agreed that the execution to be sued out on the judgment to be obtained on the said warrant of attorney should be for levying the said sum of 100*l.* and interest, or so much thereof as should be then due, sheriff's poundage, &c. That the said judgment was not obtained or recovered in any other manner or upon any other account, save upon and by virtue of such warrant of attorney as aforesaid; and that such warrant of attorney was not, nor was any copy thereof filed with the clerk of the doquets and judgments in the said court of King's Bench, or in the same court, or with any officer thereof duly appointed in that behalf, or according to the true intent

and meaning of the said first mentioned act of parliament, within the space of twenty-one days from the execution of the said warrant of attorney by the said *C. A. Collis* and *W. Collis*, or either of them, and which space of twenty-one days had elapsed before and at the time of the issuing of the fiat in bankruptcy hereinafter mentioned, nor was any judgment signed, entered up, or obtained, or any execution issued on such warrant of attorney, or under or by virtue of the same, within the said space of twenty-one days from the execution of the same warrant of attorney by the said *C. A. Collis* and *W. Collis*, or either of them, or according to the true intent and meaning of the said first mentioned act of parliament. The replication then set out the trading, the petitioning creditor's debt, and the other proceedings, in the bankruptcy of *C. A. Collis* (from which it appeared that the petitioning creditor's debt accrued on the 30th of *November* 1838, and that the fiat issued on the 3d of *December* following); and, after stating the appointment of the plaintiffs as assignees, concluded with an averment, that the fiat in bankruptcy, under which the plaintiffs became and were and are assignees as in the declaration mentioned, and under which the said *C. A. Collis* was and has been duly found and declared a bankrupt as aforesaid, to wit, the fiat aforesaid, was not awarded or issued against the said *C. A. Collis* until after the expiration of twenty-one days next after the execution of the said warrant of attorney by the said *C. A. Collis* and *W. Collis*, and each of them; whereby the said warrant of attorney and the said judgment were and are void as against the plaintiffs as such assignees as aforesaid. Verification.

Rejoinder, — that the warrant of attorney in the said replication mentioned, was executed by the said *C. A. Collis* and *W. Collis*, as therein mentioned, upon a

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certain day and year, to wit, the 9th *August* 1883; and that the said *C. A. Collis* did not become, nor was he, indebted to the said *W. A. Smith*, as in the said replication mentioned, in any part of the said sum of 100*l.* and upwards, as therein mentioned, at any time before, or at, or within twenty-one days after, the execution of the said warrant of attorney; nor did he become, nor was he, indebted to the said *W. A. Smith* in the said sum of 100*l.* and upwards, or any part thereof, until long after the expiration of twenty-one days from the said date and execution of the said warrant of attorney, to wit, not until the day and year in the said replication in that behalf mentioned. Verification.

Demurrer, assigning among other causes,—that if, as the rejoinder must be taken to admit, and which the defendants could not now, without a departure in pleading, attempt to dispute, the bankrupt was indebted to the said *W. A. Smith*, the petitioning creditor, at the time mentioned in the replication, and there was, in all other respects, a valid fiat in bankruptcy under which the plaintiffs were duly appointed assignees, it is wholly immaterial, under the act of parliament referred to in the replication, whether the said petitioning creditor's debt was or was not due at the time of the execution of the said warrant of attorney, or within twenty-one days afterwards, as relied upon in the said rejoinder.

Joinder in demurrer.

Channell Serjt. in support of the demurrer. The facts disclosed in the replication shew that this judgment is void as against the assignees of the bankrupt, by virtue of the provisions of the 3 G. 4. c. 39. (a), and

(a) Which, after reciting judgments for securing the payment of money, whereby persons in a state of insolvency are enabled to keep up the appear-

bring the case clearly within the second section of that act. The rejoinder does not attempt to deny the bankruptcy, or any of the circumstances requisite to make out the title of the plaintiffs as assignees, but states a fact, which is wholly immaterial, namely, that the petitioning creditor's debt did not accrue until after the expiration of twenty-one days from the execution of the warrant of attorney. It is submitted that this is no answer to the replication. [*Tindal* C. J. The rejoinder seems to assume that the statute does not apply unless

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ance of being in good circumstances, and the persons holding such warrants of attorney have the power of taking the property of such insolvents in execution, at any time, to the exclusion of the rest of their creditors," for remedy thereof enacts, "That from and after the 29th day of *September* next, if the holder thereof shall think fit, every warrant of attorney to confess judgment in any personal action, or a true copy thereof, and of the attestation thereof, and the defeasance and indorsements thereon, in case such warrant of attorney shall be given to confess judgment in His Majesty's court of King's Bench at *Westminster*, or such a true copy thereof as aforesaid, in case such warrant of attorney shall be given to confess judgment in any other court, shall, within twenty-one days after the execution of such warrant of attorney, be filed, together with an affidavit of the time of the execution thereof, with the clerk of the dockets and judgments in the said court of King's Bench."

By sect. 2. it is enacted, "That

from and after the said 29th day of *September* next, if at any time after the expiration of twenty-one days next after the execution of such warrant of attorney, a commission of bankrupt shall be issued against the person who shall have given such warrant of attorney, under which he shall be duly found and declared a bankrupt, then and in such case, unless such warrant of attorney, or a copy thereof, shall have been filed as aforesaid, within the said space of twenty-one days from the execution thereof, or unless judgment shall have been signed, or execution issued, on such warrant of attorney within the same period, such warrant of attorney, and the judgment and execution thereon, shall be deemed fraudulent and void against the assignees under such commission, and such assignees shall be entitled to recover back and receive, for the use of the creditors of such bankrupt at large, all and every the moneys levied, or effects seised, under and by virtue of such judgment and execution."

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the petitioning creditor's debt accrues within the twenty-one days.]

Merewether Serjt. was then called upon to support the rejoinder. This case depends on the construction to be put upon the statute. The act was passed, as appears from the preamble, to prevent injustice to creditors by secret warrants of attorney. The first section gives an option to the holder of a warrant of attorney to file it or not, as he thinks proper; and the second section states what the consequences shall be, if it be not filed within the twenty-one days. It is clear that a warrant of attorney not so filed is only void as against assignees; and it is submitted that it is not void even as against them, where judgment is entered up before the petitioning creditor's debt is contracted. The rejoinder in substance says, by reference to the plea, that the judgment was entered up on the 26th *November* 1838, and the petitioning creditor's debt did not accrue until the 30th. The act does not apply to such a case. The judgment, at the time it was entered up, was good against all the world; and being so, there is nothing in the statute to enable a party giving credit afterwards to defeat it. [*Tindal* C. J. You say that the judgment is good, if entered up at any time before the petitioning creditor's debt is contracted. What authority have you for that?] The statute is directed against secret warrants of attorney. The moment the judgment is entered up, the transaction ceases to be secret; any one may go to the office and inspect the judgment. It therefore is no longer within the mischief which the act was passed to prevent. [*Maulé* J. It is clear, if you want to insist that a warrant of attorney is good against a bankruptcy, that it must be filed within twenty-one days. You do not allege that the debts of *none* of the creditors were contracted during the twenty-one days, but only

that the petitioning creditor's debt did not accrue within that time.] The other creditors have no rights, except through the petitioning creditor's debt; *Tope v. Hockin*. (a) [Maule J. The assignees do not represent the petitioning creditor alone, but the whole body of the creditors. Supposing there were here a number of small creditors, whose debts were contracted before judgment was entered up on the warrant of attorney, according to your argument, they would be without any protection from the statute. What is the meaning of the words, "unless judgment shall have been signed or execution issued on such warrant of attorney within the same period, such warrant of attorney, and the judgment and execution thereon, shall be deemed fraudulent and void against the assignees under such commission?"] The obvious intent of the act is, where the warrant of attorney is filed within the twenty-one days, that it shall not be avoided under any circumstances, but where it is not, that its validity, in case of bankruptcy, shall depend on judgment being entered up before the party is in a situation to be made a bankrupt. Is a warrant of attorney which is not filed within the prescribed period, to be afterwards defeated by a person who knew of it at the time he gave the bankrupt credit? He may have given credit for the express purpose of defeating the warrant of attorney. [Bosanquet J. How do you get over the words "if at any time after the expiration of twenty-one days next after the execution of such warrant of attorney, a commission of bankrupt shall be issued, &c.?"] Those words should receive a reasonable construction. In *Morris v. Mellin* (b), and *Bennett v. Daniel* (c), the general words of the fourth section of this statute were qualified by the court. In the former case

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(a) 7 B. & C. 109.; 9 D.
& R. 881.

(b) 6 B. & C. 446.

(c) 10 B. & C. 500.

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Lord *Tenterden* said, "It is a general rule in the interpretation of acts of parliament, that an enactment, the effect of which is to cut down, abridge, or restrain any written instrument, shall have a limited construction." *Edmonds v. Lawley* (a), shews that vested rights are not to be affected by general words. Here the object of the act was to prevent the mischief resulting from warrants of attorney, against which, being kept secret, no prudence could guard; but it was not intended to protect parties, who were not creditors at the time when such warrants of attorney ceased to be secret by judgment being entered up upon them. In *Hurst v. Jennings* (b), Lord *Tenterden* C. J. stated, that the policy of the statute was to give publicity to warrants of attorney; and so long as that object is effected, the means by which it is attained is immaterial. [*Maule* J. According to your argument, where a warrant of attorney is filed after the twenty-one days are expired, it ceases to be a secret warrant of attorney within the statute. Are you not making another act of parliament? *Bosanquet* J. The legislature treats as secret every warrant of attorney which the holder keeps in his pocket for twenty-one days.] Such a construction will defeat all warrants of attorney not filed within the prescribed period. [*Erskine* J. No, for if the judgment is executed before any act of bankruptcy, the assignees cannot recover the proceeds.] It is submitted, that the statute was never meant to apply to a case like the present.

TINDAL C. J. I do not see how we can put the construction on this act which we are called upon to do, without adding to it a distinct and substantive provision. The second section enacts [here the Lord Chief Justice read the clause]. We are called upon to say that this

(a) 6 M. & W. 285.

(b) 5 B. & C. 650.

clause is not meant to apply, unless the petitioning creditor's debt, on which the fiat was grounded, was an existing debt before the expiration of the twenty-one days; the allegation in the rejoinder being, that the bankrupt did not become indebted to the petitioning creditor within twenty-one days after the execution of the warrant of attorney. What is that but to insert in the act a clause which it does not contain? It is our duty neither to add to nor take from a statute, unless we see good grounds for thinking that the legislature intended something which it has failed precisely to express. It is said that no injury could result from putting such an interpretation as that contended for upon the act. I think that much of the mischief which was intended to be obviated by the statute might arise from so doing. After the expiration of the twenty-one days, and before judgment was entered up on the warrant of attorney, a bankrupt might contract debts with parties, who would be deprived of the benefit of that publicity which the act intended should attach to warrants of attorney, in order to prevent credit being given to persons in insolvent circumstances.

BOSANQUET J. I think that this case falls within the statute. The court should construe the words of the act according to their obvious meaning, unless some manifest inconsistency arises upon them, when so construed. I see no such inconsistency here. The act professes to remedy the mischief arising from secret warrants of attorney. It seems to me that this warrant of attorney is to be treated as a secret warrant of attorney. A certain time is given by the statute to the holder of a warrant of attorney, within which it is to be filed: if he chooses to keep it in his own possession beyond that period, it becomes a secret warrant of attorney, and falls within the mischief provided against by the act. The judg-

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ment entered up on such warrant of attorney, however, is not absolutely void; it is good against all the world except assignees; if the party giving it is made a bankrupt, his assignees may dispute it, and treat it as fraudulent and void as against them. I see no ground for restricting the obvious meaning of the statute. If the holder might keep a warrant of attorney secret beyond the twenty-one days, he might so keep it for twelve months, and then, just before there is reason to apprehend that a fiat may issue against the party who gave it, judgment might be entered up, and execution issued to prevent a fair distribution of the bankrupt's property, which would lead to the very mischief intended to be obviated by the act.

ERSKINE J. According to the provisions of this act, if a creditor takes a warrant of attorney from his debtor for his debt, he must either file such warrant of attorney, or sign judgment and issue execution thereon within twenty-one days. It has been contended on the part of the defendants, that the petitioning creditor's debt must have accrued within the twenty-one days, or before the judgment is entered up. There is no such provision in the act. The legislature has laid down a much broader line, and has enacted that a person taking a warrant of attorney must either give immediate notice to the world, or must incur the risk of the party giving such warrant of attorney being made a bankrupt.

MAULE J. The argument on the part of the defendants seeks to introduce into the act a proviso which is not to be found there. The statute is as clear as words can make it, and declares that no one shall avail himself of a warrant of attorney, as against the assignees of the party giving it, unless it is filed, or judgment is entered up and execution issued within twenty-one days.

This is not a case in which the court is called to put an interpretation on an act in which a manifest incongruity exists; all that we have to do here is to construe the statute according to its plain and obvious meaning.

Judgment for the plaintiffs.

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Jan. 30.

CASE. The declaration stated that the plaintiff, *A.*, a wine merchant, before and at the time of the committing of the grievances by the defendant thereafter mentioned, carried on the trade and business of a wine and spirit merchant, at a certain warehouse and premises, with the appurtenances, situate in *Lawrence Pountney Lane*, in the city of *London*, and during all the time aforesaid used and employed a certain crane, with ropes and appurtenances thereto belonging, in and at the said warehouse and premises in the way of his trade and business, for the purpose of hauling up, letting down, suspending and moving in and out of and about the said warehouse and premises, pipes, puncheons, and other heavy casks, of wine and spirits, as occasion might require; and that it is wanted to .

raise pipes of wine from the cellar, says that a rope must be made on purpose. *B.* does not make the rope himself, but sends the order to his manufacturer, who employs a third party to make the rope.

Held,—in an action on the case by *A.* against *B.*, to recover damages resulting from the insufficiency of the rope, —that *B.*, as between him and *A.*, is to be considered as the manufacturer of the rope; and that an implied warranty arises out of the contract, that the rope is a fit and proper one for the purpose for which it was ordered.

Semble, that, to raise an implied warranty, it is not necessary that the vendor should also be, or should represent himself as, the manufacturer, where he is told of the purpose for which the goods are required, and the purchaser does not select them himself, but relies on the skill and judgment of the vendor.

1841. thereupon, to wit, on the 5th of *September* 1837, the
— defendant *having notice of the premises, and being a*
BROWN *dealer in ropes* amongst other things, the plaintiff then
v. bargained and agreed with the defendant, to buy of him
EDDINGTON. (amongst other things) in the way of the defendant's
business, at and for a reasonable price, to be therefore
paid by him, a rope, *to be made by the defendant for the*
plaintiff, to be used in the said crane and appurtenances
in and at the said warehouse and premises, in the way of
the said wine and spirit trade and business, for the pur-
pose of hauling up, letting down, suspending, and moving,
in, out of, and about the said warehouse and premises,
pipes, puncheons, and other heavy casks of wine and
spirits as aforesaid; and retained the defendant to put
up, splice, fix, and adjust the same rope, ready for use in
the said crane as aforesaid, for reward to the defendant
in that behalf; and the defendant afterwards, to wit, on
the day and year aforesaid, in pretended fulfilment of
the said agreement, by falsely and fraudulently warrant-
ing and representing to the plaintiff *that a certain rope,*
produced by the defendant, was made in pursuance of the
said agreement, and was good and fit for the purpose of
being used in the said crane and appurtenances in and
at the said warehouse and premises, in the way of the
said trade and business, for the purposes in that behalf
aforesaid, sold and delivered the last-mentioned rope to
the plaintiff for the said price, and put up, &c., the same
for use in the said crane as aforesaid, for reward as afore-
said, which price and reward were afterwards, to wit, on
the 30th of December in the year aforesaid, paid by him
to the defendant for the same; whereas, in truth and in
fact, the last-mentioned rope, at the time of the said
warranty, representation, and sale, was not good or fit
for the purpose or use in that behalf aforesaid; but was
then very bad, unfit, and improper for that purpose or
use, and was made of old, bad, and improper materials,

and badly and insufficiently made; of all which premises the defendant, at the time of the said sale, warranty, and representation, had knowledge and notice. And the plaintiff, in fact, said, that the defendant, by means of the premises on the day and year first aforesaid, falsely and fraudulently, and for the sake of unjust gain, deceived the plaintiff on the sale of the said rope as aforesaid; that he, confiding in the said warranty and representation of the defendant, did, after the said sale, to wit, on &c., till and at the time of the occurrence of the loss and damage therein mentioned, use and employ the said crane, rope, and appurtenances in and at the said warehouse and premises in the way of the said trade and business, for the said purpose of hauling up, letting down, suspending, and moving in and out of and about the said warehouse and premises, pipes, puncheons, and other heavy casks of wine and spirits as occasion required, which the plaintiff, but for the representation and warranty aforesaid, would not have done; and that while the plaintiff so carried on the said business as aforesaid, to wit, on the 20th of *February* 1839, while the plaintiff, confiding in the said representation and warranty made by the defendant, and believing the same to be true, was, by his servants using the said rope so sold as aforesaid, in the said crane and appurtenances at the said warehouse and premises, in the way of the said trade and business, in hauling up, suspending, and moving out of the said warehouse and premises a certain pipe of wine of the plaintiff, of great value, to wit, of the value of 100*l.*, the said last-mentioned rope, by reason of its being so bad, unfit, and improper for that purpose as aforesaid, and made of such old and bad and improper materials, and so badly and insufficiently made as aforesaid, then gave way and broke, and thereby the said pipe of wine fell to the ground, and the said pipe was broken, shattered,

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1841. thereupon, to wit, on the 5th of September 1837, the
— defendant *having notice of the premises, and being a*
BROWN *dealer in ropes* amongst other things, the plaintiff then
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business, at and for a reasonable price, to be therefore
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said trade and business, for the purposes in that behalf
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said, which price and reward were afterwards, to wit, on
the 30th of December in the year aforesaid, paid by him
to the defendant for the same; whereas, in truth and in
fact, the last-mentioned rope, at the time of the said
warranty, representation, and sale, was not good or fit
for the purpose or use in that behalf aforesaid; but was
then very bad, unfit, and improper for that purpose or
use, and was made of old, bad, and improper materials,

and badly and insufficiently made; of all which premises the defendant, at the time of the said sale, warranty, and representation, had knowledge and notice. And the plaintiff, in fact, said, that the defendant, by means of the premises on the day and year first aforesaid, falsely and fraudulently, and for the sake of unjust gain, deceived the plaintiff on the sale of the said rope as aforesaid; that he, confiding in the said warranty and representation of the defendant, did, after the said sale, to wit, on &c., till and at the time of the occurrence of the loss and damage therein mentioned, use and employ the said crane, rope, and appurtenances in and at the said warehouse and premises in the way of the said trade and business, for the said purpose of hauling up, letting down, suspending, and moving in and out of and about the said warehouse and premises, pipes, puncheons, and other heavy casks of wine and spirits as occasion required, which the plaintiff, but for the representation and warranty aforesaid, would not have done; and that while the plaintiff so carried on the said business as aforesaid, to wit, on the 20th of *February* 1839, while the plaintiff, confiding in the said representation and warranty made by the defendant, and believing the same to be true, was, by his servants using the said rope so sold as aforesaid, in the said crane and appurtenances at the said warehouse and premises, in the way of the said trade and business, in hauling up, suspending, and moving out of the said warehouse and premises a certain pipe of wine of the plaintiff, of great value, to wit, of the value of 100*l.*, the said last-mentioned rope, by reason of its being so bad, unfit, and improper for that purpose as aforesaid, and made of such old and bad and improper materials, and so badly and insufficiently made as aforesaid, then gave way and broke, and thereby the said pipe of wine fell to the ground, and the said pipe was broken, shattered,

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staved in, and spoilt, and the wine in the said pipe was spilt, scattered, spoiled, and poured out upon the ground, and thereby became and was wholly lost to the plaintiff; and by reason of the premises the said rope had become and was of no use or value to the plaintiff, and the plaintiff had also been obliged to lay out and had expended 10*l.* in purchasing and putting up a new rope for the said crane in lieu of the said bad rope sold by the defendant as aforesaid; and the plaintiff had been and was, by means of the premises, otherwise greatly injured and damnified; to the plaintiff's damage of 100*l.*, &c.

Plea : not guilty ; on which issue was joined.

At the trial, before *Maule J.*, at the sittings in *London* after last *Michaelmas* term, the following facts appeared :

On the 30th of *August* 1837, a clerk in the employment of the plaintiff, who is a wine and spirit merchant in *Lawrence Pountney Lane*, called at the shop of the defendant in *Duke Street, Smithfield*, and ordered a rope for a crane used by the plaintiff in the way of his business. On the following day the defendant's foreman went to the plaintiff's premises in order to ascertain the dimensions and kind of rope required. He examined the crane and the old rope, and took the necessary admeasurements, and was told that the new rope was wanted for the purpose of raising pipes of wine out of the cellar and letting them down into the street ; when he said that the rope would have to be made. The defendant, who was not in point of fact a rope-maker, although he professed himself to be such, forwarded the order to one *Dunn*, a rope-maker at *Stepney*, but without informing the latter of the purpose to which the rope was to be applied. *Dunn*, instead of manufacturing the rope himself, employed one *Skinner* to make it. On the 5th of *September* 1837, the rope was affixed to the plaintiff's crane by one of the defendant's servants.

On the 20th of *February* 1839, the servants of the plaintiff were removing a pipe of port wine from the warehouse to a cart, when the rope broke, and the cask falling into the street, was stove in, and the wine lost. There was contradictory evidence with respect to the workmanship of the rope and the materials of which it was composed; and an attempt was made by the defendant to shew that the breaking of the rope was caused by the improper construction of the crane. It appeared, however, that the former rope had lasted twelve years.

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It was submitted, on the part of the plaintiff, that the defendant having represented himself as the maker of the rope, and also having been told of the purpose for which it was wanted, impliedly warranted that the rope he undertook to make was fit and proper for that purpose; and *Jones v. Bright (a)* was cited.

For the defendant it was contended, on the authority of *Gray v. Cox (b)*, that the defendant, not being the manufacturer of the rope, no implied warranty arose, and that he could not be held liable for any latent defect; and that, in order to make him answerable, the plaintiff should have shewn that the defendant knew, at the time it was furnished, that the rope was unfit for the purpose for which it was designed.

The learned judge left two questions to the jury; first, whether the rope was a fit and proper one for the purpose for which it was ordered; and, secondly, if not a fit and proper rope, whether the defendant knew it to be so: directing them to find for the plaintiff in case they were of opinion that the rope was insufficient. The jury returned their verdict for the plaintiff, damages 40*l.*; but negatived any "guilty knowledge" (as they termed it) on the part of the defendant. The

(a) 5 *Bingh.* 533.; 3 *M. & P.* 155.

(b) 4 *B. & C.* 108.; 6 *D. & R.* 200.

1841. learned judge gave the defendant leave to move to enter a nonsuit, if the court should be of opinion that the scienter should have been proved, in order to entitle the plaintiff to maintain the action.

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Channell Serjt., in *Hilary* term 1840, moved accordingly, and a rule nisi was granted; against which

Bompas Serjt. and *Gray* now shewed cause. The declaration alleges both a fraudulent representation and a warranty. If the latter be made out, there is no need to prove the scienter; *Williamson v. Allison*. (a) It was admitted when the rule was moved for, that if the defendant himself had been the manufacturer of the rope a warranty would have been implied, but it was contended, that he was merely the seller of the article. One question will be, supposing the defendant is not to be considered the manufacturer, whether that fact negatives any implied warranty? In *Gray v. Cox* (b), which was an action on an implied warranty of copper sheathing, *Abbott* C. J. stated, he was strongly inclined to the opinion, that "if a person sold a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose." It is true, that some of the other judges thought differently; but that case, it is submitted, is no authority, so far as the facts appear, against the plaintiff. It may be that there the plaintiffs themselves went to the warehouse of the defendants to choose the copper sheathing. Here, it is not denied, that if the plaintiff had gone to the defendant's shop, and had selected the rope, no warranty could have been implied, for in that case the plaintiff would have acted on his own judgment. Instead of doing so, he relies on the judgment of the

(a) 2 *East*, 446.

(b) 4 *B. & C.* 108.; 6 *D. & R.* 200.; 1 *C. & P.* 187.

defendant, who, being informed of the particular purpose for which the rope is wanted, undertakes to furnish it, and thereby impliedly undertakes that the rope shall be a fit and proper one for the purposes to which it is to be applied. In point of law the defendant is to be considered the manufacturer of the article. If he suffers from the bad quality of the rope, he has his remedy over against the person by whom it was really made, supposing he informed the latter of the use for which the rope was ordered. If he did not so inform him, it was his own neglect, and he cannot now complain of hardship. When the rope was first sent home, if the plaintiff had discovered it to be insufficient, it is clear that he might have returned it, on the ground that the defendant had engaged to furnish him with a fit rope; *Street v. Blay* (a): but he could not have done so had the rope been of his own selection. Again, if the defendant had been driven to bring an action for the price of the rope, he could not have recovered without alleging that the rope was a fit one for the purpose for which it was required; and if that be so, it establishes the proposition contended for on the part of the plaintiff. In *Laing v. Fidgeon* (b), it was held that in every contract to furnish manufactured goods, it is an implied term that they shall be merchantable. So in *Bluett v. Osborne* (c), Lord *Ellenborough* says, "a person who sells, impliedly warrants that the thing sold shall answer the purpose for which it is sold;" and though his lordship there held, that the plaintiff might recover the amount which the bowsprit that he had sold was apparently worth at the time of sale, and that he was not responsible for a failure arising from a latent defect in the timber, *Best C. J.*, in *Jones v. Bright* (d), explains the judgment,

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(a) 2 B. & Ad. 456.

(b) 6 Taunt. 108.

(c) 1 Stark. N. P. 384.

(d) 5 Bing. 533.; 3 M. & P. 155.

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on the ground of the distinction which exists between the sale of a horse or a bowsprit, and a manufactured article; inasmuch as due care will prevent there being any latent defect in the latter. [*Maule J.* In *Bluett v. Osborne* there was a sale of the specific bowsprit. It is like the sale of a particular horse.] *Jones v. Bright* is an express authority for the plaintiff. There the defendants had supplied copper sheathing for a ship of the plaintiff, which sheathing shortly became useless, in consequence of some inherent defect in the article; and it was held, in an action on the case in the nature of deceit, that the plaintiff was entitled to damages, although no fraud was imputed to the defendants. Two of the judges in that case attach considerable weight to the circumstance that the defendants were the manufacturers of the copper sheathing; but *Best C. J.* places no reliance on that fact. He says, "The law then resolves itself into this; that if a man sells generally, he undertakes that the article sold is fit for *some* purpose; if he sells it for a particular purpose, he undertakes that it shall be fit for that particular purpose." If the question were with respect to proof of the scienter, then the circumstance of the defendant being the manufacturer might have some bearing on the case, for manufacturers may be presumed to know of the defects in articles made by them; but where the question is, whether an implied warranty arises out of the contract, that fact is not material. *Chanter v. Hopkins* is clearly distinguishable from the present case. It was there held, that there was not any implied warranty on the part of the plaintiff, that the patent smoke-consuming furnace should be fit for the purposes of a brewery, but that the defendant having defined by his written order the particular article to be supplied, the plaintiff performed his part of the contract by furnishing such article, and was entitled to recover the

price. *Parke B.* there observes in the course of the argument, "The difference between this case and that of *Jones v. Bright* is, that here the subject of the contract is defined, and defined accurately, by the buyer. The object for which he wanted it is immaterial." Afterwards, in delivering his judgment, that learned baron says, "I agree with the authority, which *Mr. Byles* has referred to, of *Jones v. Bright*, that if an order is given for an undescribed and unascertained thing, stated to be for a particular purpose, which the *manufacturer* supplies, he cannot sue for the price, unless it does answer the purpose for which it was supplied." The illustration, however, which *Parke B.* gives, shews that the doctrine does not apply solely to a sale by a manufacturer. "Suppose a party offered to sell me a horse of such a description as would suit my carriage, he could not fix on me a liability to pay for it, unless it were a horse fit for the purpose it was wanted for: but, if I describe it as a particular bay horse, in that case the contract is performed by his sending that horse." *Parkinson v. Lee* (a) is also distinguishable; for there the hops were sold by sample, with a warranty that the bulk of the hops answered the sample; and it was found as a fact by the jury, that they did. In every case where it has been decided, that there was no implied warranty, it will be found that the buyer had an opportunity of inspecting the goods. If the fact, that the seller of the goods is not also the manufacturer, were held to rebut any implied warranty, it would lead to the greatest inconvenience. There are many articles, different parts of which are furnished to the manufacturers ready made. If a gun-maker is employed to make a gun, is he to be allowed to say that he did not manufacture the barrel? It is submitted, that the defendant is to be considered, in point of law, the

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(a) 2 East, 314.

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manufacturer of this rope. The plaintiff did not know when he gave the order, that the defendant would not make the rope himself; but that fact is not material, for the defendant, as the seller of the rope, impliedly undertook that it should be fit for the purpose for which it was ordered.

Talfourd and *Channell* Serjts. in support of the rule. It may be conceded, that if a warranty be proved or is to be implied, the fact that the defendant did not know of the defect in the article is immaterial. Two circumstances are requisite to support the position established by *Jones v. Bright*, of an implied warranty; namely, the party must be the manufacturer of the goods sold, and must also know the purpose for which they are required. The question here is, whether the defendant is to be considered as the manufacturer of the rope. It is clear that nothing took place at the shop of the defendant, from which it can be said that he was to be the manufacturer. Neither would the fact, that his foreman went to the plaintiff's premises to inspect the crane, and was there told the purpose for which the rope was wanted, vary the case; for all this might have been done by him in the character of a mere seller of a ready-made article. But then it will be contended, that the foreman stated that a rope must be *made* for the purpose. He did not, however, say that the defendant would himself manufacture such rope. [*Maule J.* The foreman was told that the rope was wanted to draw pipes of wine from the plaintiff's cellar, and to let them down into the street. He undertook, at any rate, that the rope should fit the pulley of the crane; did he not also engage that the rope would draw the wine from the cellar?] Neither did the plaintiff at first order the rope to be made. [*Maule J.* I do not think that the evidence shewed conclusively that the plaintiff ordered

the rope to be made ; but I think it did, that he ordered it for the purpose of drawing wine from the cellar.] The declaration does not charge the defendant as the manufacturer of the rope, but as a dealer in ropes. In *Jones v. Bright*, the defendants were expressly charged as having *manufactured* the copper sheathing ; and that fact was relied on by some of the court in their judgment. Supposing the defendant, not having a suitable article among his own stock, had purchased it ready-made from another tradesman, would he in that case have been called the manufacturer ? It seems a refined distinction to say, that he is to be so considered merely because he procures the rope from the party by whom it is made. In *Jones v. Bright*, *Best C. J.* gives it as his opinion, that there was in that case an express warranty ; and although he professes to put the case on a “ broad principle,” when he comes to illustrate it, he refers to the case of a manufacturer, and says, “ by providing proper materials, a merchant may guard against defects in manufactured articles ; as he who manufactures copper may, by due care, prevent the introduction of too much oxygen.” It is clear here, that the defendant only undertook to supply the article in the ordinary way of his business as a dealer in ropes ; and that no implied contract arose from what passed, further than that he, as the seller of the rope, should not keep back any defect known to him, and that the rope should answer the description given of it in the invoice. The distinction between the manufacturer, and the seller, of any article is obvious : it would not be reasonable to hold that the latter, who has neither the knowledge, nor the means of knowledge, of any latent defect, should be held responsible.

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TINDAL C. J. It appears to me to be a distinction well founded, both in reason and on authority, that if a

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party purchases an article upon his own judgment, he cannot afterwards hold the vendor responsible, on the ground that the article turns out to be unfit for the purpose for which it was required; but if he relies upon the judgment of the seller, and informs him of the use to which the article is to be applied, it seems to me the transaction carries with it an implied warranty, that the thing furnished shall be fit and proper for the purpose for which it was designed. In the present case the facts are free from all doubt. The plaintiff sends to the defendant's shop for a crane rope; whereupon the foreman of the defendant goes to the plaintiff's premises to ascertain the dimensions of the rope required, and is shewn the crane, and is told that the rope is wanted for the purpose of raising pipes of wine from the cellar. The rope is made, and is fixed to the crane by a servant of the defendant. Upon this state of facts, it has been contended on the part of the defendant that no warranty can be implied, inasmuch as the defendant was not the actual manufacturer of the rope. I cannot, myself, see any great distinction between a manufacturer and a party who undertakes to get an article made; but, in the present case, I think the defendant must be taken to be the manufacturer. The evidence is, that he sent the order to be executed by a rope-maker of the name of *Dunn*. Can it make any difference with respect to his legal liability, whether the rope was made on his own premises, or by a person whom he employs as his manufacturer? This is a stronger case than *Jones v. Bright*; here, the attention of the defendant was distinctly called to the purpose to which the article was to be applied. I do not think that any great weight is to be given to the argument, of the hardship of holding the defendant responsible; for it was his own fault that he did not inform the person whom he ordered to make the rope, of the use to which it was to be applied. His want of a

remedy over against the manufacturer from this circumstance, ought not to prevent him from being held liable to the plaintiff.

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BOSANQUET J. I am of opinion that the evidence given at the trial sufficiently supports the warranty set out in the declaration. It seems that the plaintiff being in want of a rope for his crane, applied to the defendant, a dealer in articles of that description, to supply him with such a rope. The defendant's foreman went to the plaintiff's premises, examined the crane and the old rope, and took the admeasurement. He therefore undertook to make the rope, or to procure it to be made, fit for the purpose, which was pointed out to him, namely, of raising pipes of wine. It appears to me that this is a much stronger case than those which have been referred to in the course of the argument. In *Gray v. Cox* the question was, whether, as the copper sheathing was sold with knowledge on the part of the defendants, that it was to be applied in coppering the plaintiff's ship, a warranty was implied that it was fit for that purpose. At the trial, *Abbott C. J.* held, that "if a person sold a commodity for a particular purpose, he must be understood to warrant it fit for that purpose." Afterwards, when delivering the judgment of the court in banc, he expressed himself strongly inclined to adhere to that opinion, but stated that some of the other judges thought differently. The reasons for this difference of opinion were not stated, but a new trial was granted. In *Jones v. Bright*, the sheathing was selected by the plaintiff's shipwright. There, the court was of opinion, that the defendants being informed of the purpose for which the sheathing was wanted, an implied warranty arose. With the exception of the circumstance that there the defendants were the manufacturers of the copper sheathing, that case is not so strong as the present. Here, the plaintiff

1841. did not go to the defendant's shop. But the defendant
— sent his foreman to the plaintiff's premises to ascertain
BROWN the sort of rope required, who undertook to furnish a
v. proper rope, not then in existence, but which, on trial,
EDGINGTON. turned out not to be adapted for a crane rope. I can see
no essential distinction in this case between the defendant
being the seller, and the manufacturer, of the rope.
Where a contract is, expressly or impliedly, to furnish
goods of a particular description, a warranty is created
that they shall be of that description. Here, it appears
that the defendant did not manufacture the rope himself;
but as between the plaintiff and the defendant, I con-
ceive that the latter is to be considered as the manu-
facturer. It appears to me, that the evidence given at
the trial sufficiently establishes an implied warranty, on
the part of the defendant, to supply a rope fit and
proper for the purpose for which it was required.

ERSKINE J. I also am of opinion that this rule should
be discharged. The question is, whether the evidence
shewed that the rope was supplied under a contract
which implied a warranty, that the rope was fit and
proper for the purpose for which it was required. It
appears that at the time the order was given, the rope
was not in existence, and that the defendant was made
acquainted with the use for which it was wanted. When
a party undertakes to supply an article for any par-
ticular purpose, he warrants that it shall be fit and
proper for such purpose. If a purchaser himself selects
the article, it has been held, that the mere fact that
the vendor knows the use for which it is designed, will
not raise an implied warranty, because the skill and
judgment of the latter are not relied on in making the
purchase. In this case not only was the defendant's
foreman told the purpose for which the rope was re-
quired, but after being so told, he undertook to supply

the rope, and said that it must be made. It has been contended, that no warranty can be implied unless the seller be also the manufacturer. It is true that in *Jones v. Bright* the vendors were the manufacturers; and that fact was alleged in the declaration, and some stress laid upon it by the judges in their judgments. But it does not follow, because the court attaches some weight to a fact which clearly makes a party liable, that such fact is a necessary ingredient in the case. Here, the defendant did not make the rope, but he selected a person to make it, and had an opportunity of informing him of the purpose for which the article was wanted. If he did not do so, it was his own fault. Having undertaken to supply a rope for the plaintiff's crane, he is clearly liable to this action, the jury having found that it was not a fit rope for that purpose.

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MAULE J. I also think that this rule should be discharged. The question is, whether the material allegations in the declaration were supported by the evidence. The scienter not having been proved, it is necessary to consider whether, without it, the evidence sustained the declaration. I think that the effect of the circumstance of the vendor being also the manufacturer, is not very distinctly laid down in some of the cases. The way in which *Abbott C. J.* put the point in *Gray v. Cox* was, not that the liability of the defendant depended on his being the manufacturer of the article sold, but upon the fact of his knowledge of the purpose for which it was required, and that he must take care that it was of the proper description. Both in that case and in *Jones v. Bright*, the defendants might have performed their contracts by supplying goods of sufficient quality, although not of their own manufacture. So here, the defendant might have fulfilled his contract by getting a proper rope made; for it was not a necessary conclu-

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sion from what passed, that he was to make it himself. The foreman went the day after the order was given, and was then told that the rope was wanted to raise pipes of wine from the cellar, and that it must fit the crane, when he said that a rope must be made for the purpose. Not only was the defendant to make the rope, but to adjust it to the crane; and it is so alleged in the declaration. Supposing that the accident had happened in consequence of the rope having been improperly affixed to the crane, it is clear the defendant would have been liable. I do not see why he should be answerable in that event, and not for a defect in the rope itself. The evidence given in the case satisfactorily shewed that the defendant undertook to furnish a rope which would fit the crane and raise the pipes of wine. The jury having found that the rope was an unfit one for that purpose, the defendant has been clearly guilty of a breach of the implied warranty alleged in the declaration.

Rule discharged.

Jan. 13.

DOE dem. FIGGINS v. ROE.

An acknowledgment by the tenant in possession, on the first day of term, that the declaration (which had been served on a servant upon the premises) had come to his hands before the term, is sufficient, on a motion for judgment against the casual ejector.

TALFOURD Serjt. moved for judgment against the casual ejector. The declaration had been served upon a servant of the tenant in possession on the premises, and the tenant acknowledged, upon the first day of the term, that the declaration had been delivered to him previously to the commencement of the term.

Per Curiam.

Rule absolute. (a)

(a) See *Doe dem. Emsley v. Roe, antè*, Vol. I. p. 840.

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HALTON v. WHITE.

Jan. 13.

TALFOURD Serjt. applied for a distringas, upon affidavits stating that the usual number of calls had been made at the defendant's house. [*Maule* J. Do the affidavits state where the house is situated?] No.

The affidavits on which an application for a distringas is grounded, must state where the house of the defendant, at which the calls are made, is situated.

TINDAL C. J. Can you gather the locality of the house from any part of the affidavits? If so, you may mention the case again.

Rule refused.

WILLIAM SPINCER v. JOHN SPINCER.

Jan. 20.

ASSUMPSIT, on a banker's draft or order for 250*l*.

Plea, that before the making of the draft or order in the declaration mentioned, to wit, on the 18th of *February* 1837, one *Robert Spincer*, since deceased, in his lifetime was lawfully possessed of certain estate and effects of great value, to wit, of &c., including a certain bond or obligation thereafter mentioned, and being so

Assumpsit on a banker's cheque for 250*l*. Plea, that before the making of the cheque, the defendant, as executor of one *R. S.*,

was lawfully entitled to a bond for 500*l*, which bond was in the hands of the plaintiff, who refused to deliver up the same to the defendant; that the plaintiff and twelve others claimed to be entitled to legacies under the will of *R. S.*, and thereupon it was agreed between the plaintiff and defendant, that the plaintiff should deliver up the bond to the defendant, and that the defendant should make and deliver to the plaintiff the cheque in question, which should be a security for the payment of the legacies, and that the plaintiff should receive the *said sum of money*, upon and subject to an express condition, that the legatees under *R. S.*'s will should authorize the plaintiff to receive the said sum; that the defendant made, and the plaintiff received the cheque upon that condition, and that the legatees had not authorized the plaintiff to receive the same sum.

Held, on special demurrer, assigning for cause—that it did not sufficiently appear by the plea, that the authority to be given by the legatees was a condition precedent to the payment of the cheque,—that the plea was a good answer to the action.

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possessed thereof, *R. S.* afterwards, to wit, on the day and year aforesaid, made and published his last will and testament in writing, and thereby gave, devised, and bequeathed his said estate and effects, the same being the rest, residue, and remainder of the estate and effects of the said *R. S.*, after satisfying a certain devise in the said will mentioned, unto and amongst his the said *R. S.*'s twelve grandchildren, and to the children of his granddaughter *M. C.* deceased, such children to take their mother's share only, equally to be divided between them; and the said *R. S.* thereby constituted and appointed the defendant executor of his said will; and afterwards, to wit, on the 26th of *June* 1838, the said *R. S.* died without revoking or altering his said will; after whose death the defendant duly proved the said will, and took upon him the burthen of the execution thereof; that before and at the time of the making of the said draft or order in the count mentioned, the defendant, as such executor as aforesaid, was lawfully entitled to a certain bond or obligation, being part of the effects of the said *R. S.* in his lifetime, and then deceased, made for the payment to the said *R. S.* deceased in his lifetime of the sum of 800*l.*, with interest at a certain day in the said bond or obligation mentioned, and then elapsed, and which said bond or obligation was then in the hands and possession of the plaintiff, who refused to deliver up the same to the defendant as such executor as aforesaid, although the plaintiff well knew that he, the defendant, as such executor as aforesaid, was lawfully entitled to the same, and the plaintiff and divers, to wit, twelve other persons, claimed to be entitled to legacies under and by virtue of the last will and testament of the said *R. S.* deceased, but the amount payable to the plaintiff and the said other legatees was then unascertained; and thereupon just before the making of the said draft or order in the count men-

tioned, to wit, on the day and year therein mentioned, it was agreed by and between the plaintiff and the defendant, so being such executor as aforesaid, that the plaintiff should deliver up the said bond or obligation to the defendant as executor as aforesaid, and that the defendant should make and deliver to the plaintiff the draft or order in the count mentioned, and that the same should be a security for the payment of the legacies mentioned in the said will, and that the plaintiff should receive the said sum of money in the said draft or order mentioned, upon, and subject to, a certain express condition then contained in a certain writing then signed by the plaintiff, that the legatees under the said last will and testament of the said R. S. deceased, should authorize the plaintiff to receive the said sum of 250l.; and the plaintiff then promised the defendant that the said legatees should and would authorise him to receive the said sum; and the defendant then made the draft or order in the count mentioned, and the plaintiff took and received the same upon and subject to the said condition, and upon the faith of the said promise, and on no other account. Averment: that the said legatees under the said will had not, nor had any or either of them, ever authorised the plaintiff to receive the said sum of 250l., or any part thereof, although a reasonable time for that purpose had elapsed before and at the time of the commencement of the suit, but had wholly neglected and refused, and still did neglect and refuse so to do; and that there never was any consideration for the making of the said draft or order in the count mentioned, save and except as in that plea mentioned. Verification.

Special demurrer to this plea, assigning, among other causes, — that the agreement set out in the plea shewed a good consideration for the giving of the cheque; that any breach of that agreement by the plaintiff was no

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answer to the action on the cheque; that the plea did not shew any breach of that agreement by the plaintiff; that the delivery up of the bond to the defendant, — which delivery was not negatived, — was a sufficient performance by the plaintiff of so much of the agreement as formed a condition precedent to the payment of the cheque; that it was not alleged, nor did it sufficiently appear, by the plea, that the authority to be given by the legatees was to be a condition precedent to the payment of the cheque; that it was uncertain on the face of the plea whether the plaintiff was not himself one of the legatees; that no request to the plaintiff to obtain the authority of the legatees was averred, &c.

Joinder in demurrer.

Stephen Serjt., in support of the demurrer. This plea discloses no sufficient answer to the action. It does not appear under what circumstances the bond came into the hands of the plaintiff; but as it is not alleged in the plea that it was wrongfully in his possession, the presumption is that he had a right to hold it. It was essential to the defendant's case not only to shew that he was entitled to the bond as executor, but to claim it from the plaintiff. The latter might have a lien upon it, or it might have been placed in his custody as a security for having joined in some other bond. If this were so, then the consent of the plaintiff to deliver it up was a sufficient consideration for the giving of the cheque. Again, the plea alleges, that the cheque was to be a security for the payment of the legacies, claimed by the plaintiff and other parties, under *Robert Spiner's* will. As the contrary is not averred, those legacies must be taken to have been due; and, if so, they would form an ample consideration for the cheque. The plea proceeds to state, that the plaintiff's agreement was that the plaintiff should receive *the sum of money* mentioned

in the draft, upon and subject to a condition that the legatees under the will should authorize him to receive it. All that the plaintiff seeks is, to receive the money; after it is received it may be subject to that condition. This is an evasive plea, and is to be taken most strongly against the defendant. As the allegation is framed, it is not the fair, much less the necessary, inference, that the condition is to be a condition precedent. The true meaning of the averment appears to be, that the plaintiff was to receive the money, but unless he obtained the consent of the legatees to keep it, the defendant might recover it back. [*Tindal* C. J. The words are "should authorize the plaintiff to *receive* the said sum." It would seem that the plaintiff was not to receive the money until he was armed with the authority of the legatees.] The plea further alleges, that the plaintiff promised the defendant that the legatees would authorize him to receive the money. If the construction contended for on the other side be correct, the defendant would have been sufficiently protected by the condition itself, and it was quite unnecessary for the agreement to contain an express engagement by the plaintiff to procure the sanction of the legatees. As pleaded, the condition may be treated either as a condition precedent or subsequent; and if it be capable of the latter construction, the plaintiff, according to the rule of pleading, should have the benefit of it. Supposing the condition to be, in reality, subsequent, the plaintiff could not have safely taken issue on this plea and gone to trial; and he has therefore a right to come to the court treating it as an evasive plea. [*Tindal* C. J. As it contains mere matter of excuse, the plaintiff might have replied *de injuriâ*. (a)] That would only be a more compendious way of denying the allegation *modo et formâ*. If the plea is to be taken as stating a condition precedent, it un-

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(a) *Vide antè*, Vol. I. 720.

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doubtedly is an answer to the action; but the averment is quite consistent with the condition being a condition subsequent.

The court, without calling upon *Channell* Serjt. *contra*, were proceeding to give judgment in favour of the plea, when *Stephens* Serjt. applied for leave to amend; which, the court, after some hesitation, granted on the usual terms.

Rule accordingly.

Jan. 29.

DAVEY and Another v. PHELPS.

Debt, against a surety upon a bond conditioned for the due payment by *M.* of all sums in which *M.* should from time to time become indebted to the plaintiffs, for goods supplied to him

DEBT, upon a bond, dated the 18th of *June*, 1839, for 2000*l.*

Plea, *non est factum*; on which the plaintiffs joined issue, and proceeded to set out the bond, the condition of which was, for the due payment by one *Morris* to the plaintiffs, of all such sum or sums of money as he the said *Morris* should from time to time become indebted in to the plaintiffs for goods which should be supplied to him by them in the course of their business, when and as such sums of money should respectively become due and

by them in the course of their business. The plaintiffs having drawn a bill upon *M.* for coals supplied to him, discounted the bill, which was dishonoured. *M.* went to the plaintiffs, and telling them that he wanted 80*l.* to enable him to take up the bill, asked them to *lend* him that sum. The plaintiffs thereupon gave him a cheque for 80*l.*, with which, and his own money, he took up the bill. Held: that this was not in substance a loan by the plaintiffs to the defendant of the 80*l.*, but an advance by them for the specific purpose of taking up the bill, which, as between the plaintiffs and *M.*, remained unpaid to that extent; and that consequently as the plaintiffs might have recovered the 80*l.* from *M.* as for goods sold, the defendant was liable to pay that sum.

On a motion to reduce damages, the court, on the application of the plaintiffs, made it part of the rule that the plaintiffs should be at liberty to sign judgment and issue execution for the whole amount of the damages, but they were not to levy more than the sum to which the objection did not apply, and costs, until the court should order further.

payable, at the expiration of the credit given for the same goods, according to the usual course of business of the plaintiffs with their customers. The condition also contained a proviso enabling the defendant at any time to determine his liability under the bond, on giving a written notice to that effect to the plaintiffs. After setting out this condition the plaintiffs suggested a breach in the non-payment by *Morris* of the price of goods supplied to him by the plaintiffs.

At the trial before *Coltman J.*, at the first sittings in *Hilary* term 1840, the following facts appeared.

Previously to the 18th of *June*, 1839, the date of the bond, the plaintiffs, who were coal-merchants in *London*, had supplied *Morris* with coals to the amount of 172*l.* 8*s.* 6*d.*, and to the further amount of 167*l.* 5*s.* 3*d.* between that day and the end of the month. On the 1st of *July*, the plaintiffs, according to their usual course of dealing with their customers, drew a bill upon *Morris* for two months for 339*l.* 13*s.* 9*d.*, which they discounted at the bank of *England*. The bill, having become due on the 4th of *September*, was dishonoured, and notice of that fact was given by the bank to the plaintiffs on the 5th.

On that day *Morris* called upon the plaintiffs, and informing them that he was deficient 80*l.* in the amount necessary to take up the bill, asked them to *lend* him that sum. The plaintiffs accordingly gave him a cheque for 80*l.*, when he went to the bank, and with the cheque and money of his own, took up the bill. The plaintiffs in the present actions ought to recover the 80*l.*, and also the sum of 249*l.* 18*s.* 6*d.* for coals subsequently supplied to *Morris*. The bill for the 339*l.* 13*s.* 9*d.* was produced at the trial on the part of the plaintiffs, but was in the hands of the assignees of *Morris*, who had become a bankrupt.

For the defendant it was contended, that he was not liable for the 80*l.*, inasmuch as it was a *loan* to *Morris*,

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and was not a debt contracted by *Morris* for goods supplied to him in the course of the plaintiffs' business.

A verdict was taken for the plaintiffs, and the damages on the breach suggested were assessed at 329*l.* 18*s.* 6*d.*, leave being reserved to the defendant to move to reduce the damages to 249*l.* 18*s.* 6*d.*

G. Hayes in *Hilary* term, 1840, having obtained a rule nisi to reduce the damages accordingly,

Sir *F. Pollock*, on the part of the plaintiffs, applied for liberty to issue immediate execution for 249*l.* 18*s.* 6*d.*, the amount of the damages to which the objection taken did not apply, together with the costs.

The court, after referring to the case of *Hellings v. Young (a)*, granted the application, and the rule was drawn up in the following terms: —

“It is ordered, that the plaintiffs, upon notice of this rule to be given to them or their attorney, shall shew cause to this court, on &c., why the damages on the verdict found for the plaintiffs on the trial of this cause, &c., should not be reduced to the sum of 249*l.* 18*s.* 6*d.* And it is further ordered, that the plaintiffs be at liberty to sign judgment and issue execution for the whole amount, but not to levy more than the said 249*l.* 18*s.* 6*d.* and costs, to be taxed by one of the masters of this court, until this court shall further order.”

Sir *F. Pollock* and *Knowles* now shewed cause against the rule obtained by *Hayes*. The question is, whether the plaintiffs could have sued *Morris* in respect of the 80*l.* as for goods sold, or could only have recovered it

(a) 3 *Scott*, 770.

as for money lent. If they could have sued as for goods sold, the surety is liable, otherwise it may be admitted that he is not. It is clear that the advance of the 80% was not meant as a loan. It was a payment by the plaintiffs in satisfaction of their own liability to the bank of *England*. If that be so, the bill would still remain unsatisfied, to the extent of the 80%, as between the plaintiffs and *Morris*; and the latter might have been sued as for goods sold. It cannot be said that, as between the plaintiffs, *Morris*, and the surety, the advance of the 80% was a payment of the bill. If the bill, instead of being discounted, had remained in the hands of the plaintiffs, and *Morris* had paid the amount all but 80%, it is clear that the plaintiffs might have recovered that sum as due for goods sold. So also, if the plaintiffs, on receiving the rest of the money from *Morris*, had added to it 80% of their own, and had themselves taken up the bill. The case is not at all altered by the plaintiffs, instead of sending their own clerk to take up the bill, making *Morris* their agent for that purpose, who would have been guilty of a fraud if he had applied the money in any other manner. The 80% was not *lent* to *Morris*, but was merely put into his hands for a specific purpose; and in case he had not taken up the bill, any action against him for that sum would have been, not for money lent, but for money had and received. As soon as the bill became due, and was dishonoured by *Morris*, the plaintiffs had a right of action against the surety, and that right was not in any degree affected by what took place between the plaintiffs and *Morris*.

G. Hayes in support of his rule. This was clearly a loan by the plaintiffs to *Morris* of the 80%. By the bond, the surety might at any time, on giving notice in writing, determine his responsibility. The bill, on

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being taken up, was retained by *Morris*, who was thereby enabled to impose on the surety, by representing that he had paid for all coals furnished up to that time, and to prevail on him to continue his responsibility. If the surety had been aware that the goods previously supplied were not fully paid for, he probably would have refused to be answerable for coals to be subsequently sold to *Morris*. *Morris* applied in direct terms for a *loan* of money; and it is clear that the plaintiffs might have maintained an action for money *lent*. There can be no doubt that a new cause of action arose on the money being advanced; and the statute of limitations would run from the time of such advance, and not from the time that the bill was taken up. The evidence in the case is inconsistent with the argument that *Morris* was the agent of the plaintiffs in taking up the bill. If that had been so, the bill would have been delivered over to the plaintiffs. [*Tindal* C. J. That would have been a strong argument, if the plaintiffs had advanced the whole of the money.] *Morris* was not obliged to use the 80*l.* received from the plaintiffs in taking up the bill in question, but might have appropriated it in paying other bills, and have met this particular bill out of funds elsewhere obtained. If the plaintiffs had sued *Morris* for the 80*l.* as for goods sold, the bill would have been evidence of payment. [*Tindal* C. J. It would only have thrown upon the plaintiffs the onus of proving that the coals had not been actually paid for.] There was no evidence to shew that the plaintiffs meant the 80*l.* to be a payment by them to the bank, but, on the contrary, the advance, both in terms and in substance, was a loan to *Morris*.

TINDAL C. J. Looking at the substance of the transaction, it appears to me that this was not a loan of the 80*l.* to *Morris*, but that it was an advance of that sum

for the specific purpose of being added to money of his own, in order that he might carry it to the bank of *England*, and there take up the bill for 339*l.* 13*s.* 9*d.* What is the nature of a loan? That when the money has been advanced the lender loses all control over it. Here, it was not probable that the plaintiffs intended to lend the money to *Morris*, who confessed himself unable to take up the bill; neither is it to be supposed that the plaintiffs were ignorant that, by advancing the 80*l.* to *Morris*, as a loan, they would to that extent discharge the surety. The precise language used by *Morris*, on applying for the money, must not be too strictly regarded; we must take into consideration the whole circumstances of the transaction, and what was the obvious understanding and intention of the parties.

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BOSANQUET J. The real question is, whether all the coals supplied by the plaintiffs to *Morris* in *June* 1839, subsequently to the time that the defendant became his surety, have been paid for; or whether a sum of 80*l.*, in respect of such coals, still remains due. In the latter case the surety is liable in the present action. It appears that *Morris* gave his bill for the whole amount; which would be no satisfaction unless the bill were duly honoured at maturity. When the bill became due, a certain portion of it, namely, 259*l.* 13*s.* 9*d.* was paid by *Morris*, and 80*l.*, the residue, by the plaintiffs, who furnished *Morris* with the latter sum in order to enable him to take up the bill. As between the plaintiffs and *Morris*, it is clear, therefore, that part of the bill to the extent of 80*l.*, is still unpaid; and, consequently, that the plaintiffs have a claim for coals to that amount which still remains unsatisfied.

ERSKINE J. I am of the same opinion. The question is, whether the plaintiffs intended to advance *Morris* the

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80*l.* as a loan, or whether they gave it to him, as their agent, to be employed in partly taking up the bill. The defendant relies on the words used by *Morris* when he asked for the money. He undoubtedly asked the plaintiffs to lend him the 80*l.*, but we must look at the circumstances under which the money was advanced, rather than at the particular expressions used. When we find that the plaintiffs were not originally inclined to trust *Morris* with coals on his own credit, it is clear that they had no great confidence in his personal responsibility, and that confidence would not be increased by his inability to meet this bill. It is, therefore, not likely that they would release the surety to that extent by *lending Morris* the 80*l.* The fair conclusion to be drawn from the evidence is, that the plaintiffs merely meant to advance that sum to *Morris* for the specific purpose of being applied by him, as their agent, in taking up the bill.

MAULE J. I also am of opinion, that the fair conclusion to be drawn from the facts of this case is, that the sum of 80*l.* still remains due to the plaintiffs for coals supplied to *Morris* in the latter part of the month of *June*. The plaintiffs were not likely to trust *Morris* on his own responsibility, when they would not sell him coals, unless he found a surety, and particularly after he confessed himself unable to take up this bill. The verdict must, consequently, therefore, stand for the whole amount for which it was taken at the trial.

Rule discharged.

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CHISMAN and Another v. COUNT and HAWLEY. Jan. 30.

ASSUMPSIT, for money lent, and on an account stated. Plea: non assumpsit.

The plaintiffs claimed a balance of 127*l.* 3*s.* 2*d.*, under the following particulars of demand.

1833.	£	s.	d.
Dec. 14.			
Draft to <i>Parker</i>	- 100	0	0
Ditto to <i>Whiffin</i>	- 11	17	6
To balance due from <i>J. Webster's</i> ac- count to <i>William</i> <i>Hawley</i>	-	3	10 11
To interest to <i>May</i> 31. 1839	-	27	4 6
	<u>£142</u>	<u>12</u>	<u>11</u>

1833.	£	s.	d.
Dec. 23.			
By sale of ten quar- ters peas, ex <i>Tay-</i> <i>lor</i>	- 15	9	9
Balance	- 127	3	2
	<u>£142</u>	<u>12</u>	<u>11</u>

Where *A.*, one of the defend-
ants, was
shewn an ac-
count by the
clerk of the
plaintiffs at
their count-
ing-house,
and he ob-
jected to one
of the items,
but made no
remark with
respect to the
rest :

Held, that
this was evi-
dence of an
account stated
by *A.* of the
items of the
account to
which no ob-
jection was
made.

At the trial before *Tindal* C. J. at the sittings in *London*, after *Michaelmas* term, 1839, it appeared that one *Webster*, who occupied a farm in *Essex*, having become embarrassed, had made an assignment of his estate and effects to the defendants as trustees for the benefit of his creditors. The plaintiffs, who are corn-factors in *London*, in support of the first count of the declaration, produced two cheques, which had been drawn upon and paid by them on account of the insolvent estate; but those cheques were objected to as being inadmissible in evidence, on account of their not being stamped, and were rejected. The plaintiffs then, in order to prove the second count, called their clerk, who stated, that on one occasion when

To con-
nect *B.* with
A., as a co-
promisor, it
was shewn
that they were
the trustees of
an insolvent
estate, in re-
spect of which

the debt arose; that *A.* and *B.* were at the counting-house of the plaintiffs on several occasions together; that at a meeting of the creditors of the insolvent estate, the amount of the plaintiff's debt was stated by one of the defendants in the presence of the other; and that *B.* had admitted in a letter that there was a debt due to the plaintiffs.

Held: that the jury were justified in coming to the conclusion, that *A.*, in stat-
ing the account with the plaintiffs, had authority to bind *B.*

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Hawley was at the plaintiffs' counting-house, he shewed him an account in the plaintiffs' ledger, headed, " Trustees of the estate of *Webster* ;" that *Hawley* looked over the account (a), and objected to the third and last item of 3*l.* 10*s.* 11*d.*, but made no remark with respect to the two other items; that the witness gave him a copy of the account, which he took away with him, and said he would send corn from the farm to balance the account. In order to connect *Count* with this admission by *Hawley*, evidence was given to shew that they had acted jointly in the execution of the trust, and several times had been at the plaintiffs' counting-house together; and that after the account was delivered to *Hawley*, both of the defendants were present at a meeting of *Webster's* creditors, when one of the defendants in the hearing of the other, stated that the plaintiffs' debt was about 100*l.* A letter from *Count* to the plaintiffs' attorney was also put in, in which he acknowledged that there was something due to the plaintiffs.

For the defendants it was contended, that the plaintiffs had failed to establish the second count, and that the plaintiffs were bound by their particulars, which said nothing of an account stated; but the Lord Chief Justice thought that there was nothing in the particulars to mislead the defendants, and that there was evidence to go to the jury, of an account stated by the two defendants. The jury found their verdict for the plaintiffs for 96*l.*, being the amount of the balance claimed by the plaintiffs after deducting the item objected to by *Hawley*.

Bompas Serjt. in *Hilary* term, 1840, having obtained a rule nisi to set the verdict aside, and to enter a non-

(a) The account was the same as the particulars of demand, with the exception of the claim for interest.

suit, on the ground that there was no evidence to support the account stated,

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Channell Serjt. (*Talfourd* Serjt. was with him) now shewed cause. There was clearly sufficient evidence to go to the jury, of an account stated by the defendant *Hawley*. With respect to *Count*, he was bound by the act of his co-trustee, who had authority, as his agent, to state an account for him. If it were necessary to shew *Count's* individual acquiescence, that is established by what passed at the meeting of the creditors, and by his letter to the plaintiffs' attorney.

Peacock (*Bompas* Serjt. was with him), in support of the rule. It is submitted that there was no sufficient evidence that either *Hawley* or *Count* had stated any accounts. To make a good account stated, there must be some one present who can settle the account. Here, the plaintiffs' clerk had no authority to waive the item objected to by *Hawley*; and, in fact, did not do so, for that item is included in the plaintiffs' particulars. [*Moule* J. Is it not evidence of an account stated, where one party says, you owe me 15*l.*, and the other replies, no; I only owe you 10*l.*?] In *Breckon v. Smith* (a), where the defendant had admitted, in conversation, that he owed the plaintiff 13*l.* 10*s.*, such admission was held not to be sufficient evidence of an account stated. [*Tindal* C. J. There, the admission was to a stranger; here it was made in the plaintiffs' counting-house to their clerk, with whom the defendants transacted business.] A qualified acknowledgment of a sum due to a plaintiff will not entitle him to recover upon an account stated, *Evans v. Verity* (b); and, here, *Hawley* must be understood as having assented to the other items

(a) 1 *Ad. & E.* 488.(b) *R. & Moo. N. P.* 239.

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in the plaintiffs' account, only on the condition that they would abandon that to which he objected. It is necessary that a balance should be struck, and some sum finally agreed upon between the parties. In *Teal v. Auty* (a), an admission that something was due and a promise to pay, were held insufficient to support a count upon an account stated. [*Maule J.* That case would be in point if the plaintiffs relied on *Count's* letter alone.] In *Wayman v. Hilliard* (b), a demand by the plaintiff before bringing his action of 40*l.*, and an offer by the defendant of 17*l.*, were held to be no evidence of an account stated. [*Tindal C. J.* Here, there is a regular account, and *Hawley* admits that it is correct except one item. Is not that evidence to go to the jury?] No claim is made in the particulars in respect of an account stated. [*Tindal C. J.* The particulars are not restricted to any count, but are admissible under any count to which they are applicable.]

Secondly; it is submitted that no evidence was given of *Count* ever having stated any account. There was nothing to shew that *Hawley* was acting on behalf of *Count*. What passed at the meeting of the creditors, and *Count's* letter, did not amount to an admission by *Count* that *Hawley* had authority to act for him, but, at the most, to an acknowledgment that something might be owing to the plaintiffs.

TINDAL C. J. It appears to me, that there was evidence to go to the jury of an account stated by both of the defendants. If the case had rested on the evidence of the clerk alone, there was sufficient evidence for the jury as against *Hawley*. Then with respect to *Count*, let us look at the other facts in the case. He and *Hawley* stood in the same relation to each other, being

(a) 2 *Brod. & B.* 99.

(b) 7 *Bingh.* 101.; 4 *Moo. & P.* 729.

jointly concerned in carrying on the
At a meeting of the creditors, one
the other acquiesces in the statement
about 100% is due from them to the
appears to me to be evidence to go to
Hawley, when the account was shewn
plaintiffs' clerk, was acting as the agent of
I think that the jury have come to a right conclusion

BOSANQUET J. I also think that there was sufficient
evidence to go to the jury of an account stated by the
defendants. It is objected, that when *Hawley* made the
admission which is relied on as amounting to an account
stated, he did not admit the whole account. It appears,
that when the account was produced, he only objected
to one item, and made no remark with respect to the
rest. I think the effect is the same as if he had said
that he admitted all the items to be due except that
particular item, and that what passed was evidence of
an account stated to that extent.

ERSKINE J. I also am of opinion that what passed
at the plaintiffs' counting-house between their clerk and
Hawley, was sufficient evidence to go to the jury of an
account stated by *Hawley*. The latter looks over the
account, and only objects to one item; and he takes away
with him a copy of the account. On several occasions
afterwards he and *Count* came to the counting-house
together. What took place there was not proved; but
looking at the whole of the circumstances in the case,
I think that there was evidence for the jury, that *Count*
had constituted *Hawley* his agent in stating the account,
and that the jury came to the right conclusion upon
such evidence.

MAULE J. The account is shewn to *Hawley* by the
plaintiffs' clerk; he looks it over, and only objects to the

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in the last item, and thereby, in effect, admits the rest to be due. The plaintiffs also, by their clerk, admit the remainder of the account to be due. It is objected that the plaintiffs claimed more, and did not abandon the item to which *Hawley* objected. I do not consider that circumstance material. The admission by *Hawley* was not conditional; for he did not say that *if* the plaintiffs would strike out that item he would admit the rest. In the absence of authority to the contrary, and on reason, I think that parties may agree on one matter, although there be some other matter on which they do not agree; and that there clearly was in this case evidence, to go to the jury, of an account stated by *Hawley*. Then as regards *Count*, he and *Hawley* were acting jointly in the management of the farm, in respect of which the debt arose. It was shewn that *Count* was several times at the plaintiffs' counting-house; and there can be little doubt but he either saw or heard of the account. Then, at the meeting of the creditors, a sum is mentioned, tending strongly to the conclusion, that he must previously have known the amount of the plaintiffs' debt. There is also a letter from him in which he speaks of the debt; and though he does not name it, he appears clearly cognisant of the amount. I think that this evidence, taken together, fully justified the jury in the conclusion to which they have come.

With respect to there being no mention of an account stated in the particulars, I do not see that there is any thing in that objection.

Rule discharged.

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JONAS COATES v. WILLIAM SANDY.

Jan. 11.

MANNING Serjt. obtained a rule calling upon the plaintiff to shew cause why the service (a) of the writ of summons and the notice of declaration in the cause, and all subsequent proceedings, if any, had thereon, should not be set aside for irregularity, with costs.

This rule was obtained upon an affidavit, made by the defendant and his attorney, with papers annexed, stating that the defendant was, on the 26th of *November* last, served with a copy of a writ of summons issued on the 26th of *May* preceding, and that on the 8th of *January* in this year he was served with a notice of declaration, dated 8th of *January* 1840; and that the action was brought to recover 2*l.* 8*s.* of which 10*s.* and 9*s.* had been paid before the service of the writ of sunmons.

In answer to the application, it was sworn, that after the issuing of the writ of summons, a negotiation had been opened between the plaintiff's attorney and the defendant, which continued down to the 9th of *November*, when the defendant called at the office of the plaintiff's attorney, and asked for further time to pay the remainder of the debt; that he was then told by the attorney's clerk that the action must go on, but that as the writ was more than four months old, it was out of date, and that a new writ or an alias must be sued out; that upon this the defendant said, "Never mind; give me the copy of it now, do not go to any further expense in suing out a new writ;" that the defendant was thereupon asked, whether he would accept service of the original writ of

A writ of summons is served on the defendant more than four calendar months after its date, at his request, in order to avoid the expense of a new or an alias writ. Held: good service.

A notice of declaration is served, in which, by a mistake in inserting the year, such notice is made to bear date three months before the issuing of the writ of summons; to which notice is attached a particular of the plaintiff's demand, dated on the same day and month as the notice of declaration, with the pro-

per year. Held: no irregularity.

(a) *Ante*, Vol. I. p. 426.

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summons if he was served with a copy of that writ, and the defendant said that he would; that the defendant was then served with a copy of that writ, and at his request the plaintiff's attorney entered an appearance for him; that the defendant subsequently applied for and obtained time till the 7th of *January*; that the defendant failing in his promises of payment, he was, on the 8th of *January*, served with a notice of declaration, such notice being wafered to and served with the particulars of demand, which were dated the 8th of *January* 1841.

Channell Serjt. now shewed cause. The irregularity in the service of the writ of summons may be admitted; but it has been waived by the defendant. With full knowledge of the irregularity, the defendant says, "Never mind, give me the copy now;" and after that he obtains further time.

In 2 *Chitt. Rep. (a)*, *Dampier* J. held, that the omission of a date, in a notice of declaration, where the party could not be misled, was no ground for setting aside the proceedings. Here, the defendant knew that the action had not been commenced until after *January* 1840; consequently he must have been aware that the date was erroneous and to be rejected. This is stronger than the case referred to, as here the particulars of demand were properly dated. The defendant therefore saw at the same time two dates, one, correct and agreeing with the service, the other, an impossible date.

Manning Serjt., in support of the rule. At the time of the service of the writ of summons, the writ had expired and had become waste paper. The defendant was served with a copy of a writ which no longer existed; and it is the same thing as if he had been served with a paper purporting to be a copy of a writ, but which writ

had never been issued. No waiver can restore the efficacy of a writ which has ceased to be executable by the express provision of the uniformity of process act, which declares that no writ shall be *in force* for more than four calendar months from the date thereof. Service of a writ after the four months have expired is not distinguishable from the service of a writ on a *Sunday*, which no subsequent acquiescence can make good. [*Tindal* C. J. You have entered an appearance.] That is no estoppel. A nullity cannot be waived, and the voluntary appearance of a defendant to an action in which no process has issued, cannot avail the plaintiff. (a) *Taylor v. Phillipps*. (b) [*Bosanquet* J. There, nothing was done by the parties; and the point raised was, waiver by operation of *law*.] *Garratt v. Hooper* (c), *Roberts v. Spurr*. (d) Here, no new writ could have been sued out; for the debt remaining due in *November*, is admitted to have been under 40s. (e), and was, therefore, beneath the dignity of this court (g); and it would seem, as the statute declares that the writ shall not be in force

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(a) By *R. H. 14 Jac. 1. Reg. 2. s. 4.*, it is ordered, "that no bail be offered to be put in by any attorney for any party against whom no process is sued or original brought, but the party being present, and the assent of the court thereunto had." This rule, though printed amongst the rules of the court of Common Pleas, purports to be made by the judges, generally, for all the courts. In the Exchequer, the old rules (of 1654) direct that all appearances in the office of pleas, in person, by attorney, upon process, or by consent or order, shall be entered on the office books by an attorney of the said office, and

the day of appearance inserted. In that rule the appearance by consent, or by order, may relate to appearance after removal of the cause. As to the removal of causes into the Exchequer, see *Mann. Exch. Prac. Revenue Branch*. As to the practice in the Queen's Bench, see *Mackreth v. Jackson*, 1 *M. & S.* 408. n. And see *Doctrina Placitandi*, tit. *Gratis*.

(b) 3 *East*, 155.

(c) 1 *Dowl. P. C.* 28.

(d) 3 *Dowl. P. C.* 551.

(e) If a debt, originally above 40s., be reduced by payment under 40s., the plaintiff may sue in the county court. *Com. Dig. County* (C. 8.).

(g) 4 *N. & M.* 92.

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more than four calendar months, it was then too late to return *non est inventus* whereon to ground an *alias*.

Though the notice of declaration was annexed to the particulars of demand, it does not follow that both papers were signed on the same day; the date of the one would not therefore ascertain the date of the other. The defendant undoubtedly knew that the notice of declaration could not have been signed on the 8th of *January* 1840, long before the writ of summons issued, but he would not know whether the mistake was in the year or in the month.

TINDAL C. J. This is not a case of simple waiver. I agree that a nullity cannot be waived; but here there is a great deal more. That which passed on the 9th of *November* appears to me to amount to an agreement to accept service of the old writ, in order to avoid the expense of a new writ. That agreement was followed up by a request on the part of the defendant, that the plaintiff's attorney would enter an appearance for him; and this was accordingly done. The defendant cannot avail himself of an irregularity, in the service of the writ, to which he has himself assented. In the cases cited the waiver set up consisted of some act done by the defendant after knowledge of the defect. Here, the very irregularity relied on is an act done at the defendant's own request. Upon the second point, I am of opinion, that under the circumstances stated in the plaintiff's affidavit, the defendant could not have been misled by the mistake in the date.

BOSANQUET J. and ERSKINE J. concurred.

MAULE J. This is not properly a waiver; it is an agreement to accept service after the proper time for service has expired. The statute directs personal ser-

vice of the writ, but such service is very commonly dispensed with in practice. The statute does not say that in no case shall service after the four months be valid.

Rule discharged with costs.

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DEACON and Others, Executrix and Executors
of FRANCIS DEACON, deceased, v. STODHART
and Others.

Jan. 29.

ASSUMPSIT, by the plaintiffs, as executrix and executors of one *Francis Deacon*, deceased, against the defendants as the acceptors of a bill of exchange for 150*l.*, bearing date the 30th *November* 1836, and payable three months after date, drawn by one *Edward Andrews*, and by him indorsed to the testator in his life-time.

There was a second count for money paid by the testator for the use of the defendants.

Pleas: first, non assumpsit, to the second count; secondly, to the first count, that the defendants before the commencement of the suit, to wit, on the 3d *March* 1837, when the said bill of exchange in the first count mentioned became and was due and payable according to the tenor and effect thereof, duly paid and honoured

Payment by a stranger of the amount of a bill of exchange to the bankers at whose house the bill is, by the acceptance, made payable, under an arrangement with such bankers, whereby the party paying obtains possession of the bill for a collateral purpose of his own, is not a

payment of the bill *by the acceptor*. Nor can such payment, if made before the bill becomes due, be considered as a payment for the honour of an indorser.

Where, therefore, to a count by the executors of *A.*, the indorser, against *B. C. D.*, the acceptors, of a bill, the defendants pleaded payment, and the evidence was that *A.* had placed the bill in the hands of *E.*, in order to be presented, who improperly discounted it, and, to regain possession of it, paid the amount into the bankers of *B. C.* and *D.*, the acceptors, and then returned the bill to *A.*; it was held, that this evidence negatived the plea.

Held, also, that where the finding on one issue is for the plaintiff, and the other for the defendant, and cross rules are sought for, to set aside the verdict on such findings, each party must move within the first four days of term.

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the same when presented for payment, to wit, on the day and year aforesaid, according to the tenor and effect of the said promise of the defendants in the said first count in that behalf alleged: and then paid the said sum, to wit, of 150*l.*, the amount made payable by the said bill, according to the tenour and effect thereof, and their said promise in that behalf in the first count mentioned; concluding to the country.

There was a demurrer to the third plea. (*a*)

The defendants pleaded fourthly, that they accepted the bill for the accommodation of the drawer thereof, the said *E. Andrews*, with the knowledge and privity of the said *Francis Deacon*; that afterwards, and after the making of the bill, the said *E. Andrews* became and was insolvent, and was indebted to divers persons in large sums of money; and, thereupon, afterwards, to wit, on the 1st *February* 1838, the said *Francis Deacon*, one *S. Wilson*, one *T. Alder*, and the defendants, all then being creditors of the said *E. Andrews*, or to whom the said *E. Andrews* was then under pecuniary liabilities, agreed amongst themselves, as the mutual friends of the said *E. Andrews*, and for his relief and ease and benefit, to release their several debts and liabilities to the said *E. Andrews*, and never afterwards to enforce payment thereof; that the defendants and the said *S. Wilson* and *T. Alder* then discharged and released to the said *E. Andrews* their several debts and liabilities respectively, and then agreed with, and promised, the said *E. Andrews*, that they respectively would never enforce, demand, ask, or sue for payment of their respective debts or liabilities; and the said *Francis Deacon* then, in consideration of the premises, and that certain other creditors of the said *E. Andrews* would release, abandon, and never enforce payment of their debts against the

(*a*) See 5 *New Cases*, 594.; 7 *Scott*, 768.

said *E. Andrews*, agreed with the defendants, and then faithfully promised them, the defendants, that he, the said *Francis Deacon*, would never ask for, sue for, demand or enforce, payment of the said bill of exchange; that, by reason and in consequence of the said promise of the said *Francis Deacon*, and of the defendants and the said *S. Wilson* and *T. Alder*, never to enforce, ask, sue for, or demand, payment of their respective debts or liabilities as aforesaid, the said other creditors of the said *E. Andrews*, to wit, one *Mr. Turner, &c.*, agreed with and promised the said *E. Andrews*, to release their several debts and liabilities, and never to enforce, ask, sue for, or demand, payment of their debts and liabilities respectively, amounting together to a large sum, to wit, 1000*l.*; and that they, the defendants and the said *S. Wilson, T. Alder, Mr. Turner, &c.*, creditors of the said *E. Andrews* as aforesaid, in consideration of the premises, and of the said promise by the said *Francis Deacon*, never had enforced, sued for, asked, or demanded, payment of their debts respectively, or any part thereof, and had released the same to the said *E. Andrews*, for and upon the considerations aforesaid. Verification.

The plaintiffs joined issue upon the first and second pleas; and replied to the fourth plea, that the said *Francis Deacon* did not agree in manner and form as in that plea in that behalf alleged; and issue thereon.

At the trial before *Coltman J.*, at the adjourned sittings in *London* after *Michaelmas* term 1839, the plaintiffs abandoned their second count, and rested their case on the count upon the bill. The defendants, in order to support the plea of payment, called a clerk of *Messrs. Weston and Co.*, bankers in *Southwark*, at whose banking house the bill was made payable. He stated that the defendants kept an account with *Weston and Co.*, and that, on the 3d of *March* 1837, the day when the bill

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became due, the balance in their favour was upwards of 300l.; that the bill was presented on that day, and was paid and cancelled in the usual manner. On his cross-examination, he admitted that 150l. was paid into the bank, that morning by a stranger, for the purpose of meeting the bill, and on condition that the bill should be given up to him. He added, that the receipt of the 150l. and the payment of the bill were entered in the defendants' account. A witness of the name of *Jones* was then called for the plaintiffs, who stated that several days before the bill became due, *Deacon*, the testator, handed it to him for the purpose of being presented, at the same time directing that it was not to be noted; that the witness having indorsed the bill, discounted it at the bank of *England*; that on the morning the bill became due, he called at *Weston and Co.'s* to ascertain if they would accept the amount of the bill from him, and deliver it up to him after it was paid; and having received an answer in the affirmative, he sent the amount to them and obtained the bill, which he then returned to the testator.

To establish the fourth plea the defendants (among a variety of other circumstances), proved, that they accepted the bill for the accommodation of a *Dr. Andrews*; and two of their witnesses stated that the testator himself informed them of that fact, and said that he would never call upon the defendants for payment.

The learned judge told the jury, that if the bill was paid either by the defendants themselves or by some other person, in pursuance of some arrangement between the parties to the bill by which the defendants were to be relieved from the payment of it, that would, in point of law, be such a payment as would support the second plea; that it had been contended on the part of the plaintiffs, that the payment was made for the honour of the indorser *Jones*; but that, regularly, there could be no payment

for the honour of an indorser until default had been made by the drawee, and that it was for the jury, looking at all the circumstances of the cases, to say whether or not the bill had been paid according to the usage and custom of merchants. With respect to the fourth plea, his lordship's opinion was, that the defendants had failed to prove it. The jury returned a verdict for the defendants on the first issue, and on that raised by the plea of payment; observing, "We think the bill was paid by the defendants under some arrangement between the parties;" and found for the plaintiffs upon the issue on the fourth plea. (a)

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Atcherley Serjt., in *Hilary* term, 1840, pursuant to leave reserved to him at the trial, obtained a rule *nisi* to enter the verdict for the plaintiffs, on the issue raised upon the plea of payment, or for a new trial; submitting that such plea was clearly disproved by the evidence.

Hoggins, on the eleventh day of the term, obtained a rule *nisi* to enter the verdict for the defendants, on the issue raised by the fourth plea, or for a new trial.

Jan. 21.

Thesiger and *Hoggins* now shewed cause against the rule obtained by the plaintiffs. If the court see that substantial justice has been done between the parties, they will not disturb the verdict. It is submitted that the plea of payment was sufficiently made out. The 150*l.* paid into *Weston* and Co.'s by *Jones*, was carried to the defendants' account, and when the bill was paid, they were debited with the amount. The bill was, therefore, paid by *Weston* and Co. on behalf of the defendants. If the 150*l.* had not been paid in by *Jones*, there is no doubt that the bankers would have

(a) See 9 *Carr. & P.* 685.

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paid the bill in the usual manner, as they had ample funds of the defendants in their hands for that purpose. The question is, whether the jury were warranted in finding that the bill was paid either by the defendants themselves or by *Deacon*, the testator, through the agency of *Jones*, under some arrangement between the parties that he should not call upon the defendants for the amount. Whether the plaintiffs might not have maintained an action against the defendants for money lent, is not material to the present inquiry. It was contended, on the part of the plaintiffs, that the payment was for the honour of the indorser; but it was very properly observed by the learned judge at the trial, that there could not be a payment for honour until the bill had been dishonoured by the acceptors. The payment of the bill cannot, therefore, be otherwise put than as a payment of which the plaintiffs had a right to avail themselves. It was decided in *Ex parte Lambert* (a) that a person taking up a bill for the honour of the drawer, has no right against the acceptor without effects.

Atcherley Serjt. and *Petersdorff*, in support of the rule. The plea was clearly disproved. There is no pretence for saying that the 150*l.* paid into *Weston* and Co.'s bank was paid in on any other account than to take up the bill in question. [*Maule* J. The clerk who was called as a witness did not state that the bill would have been paid if the 150*l.* had not been sent.] The mere circumstance that the bankers credited the defendants' account with the 150*l.*, and debited it with the payment of the bill, does not vary the case. If *Weston* and Co. had really understood that the bill had been paid on account of the defendants, they would have retained it instead of giving it up to *Jones*.

(a) 13, *Ves.* 179.

TINDAL C. J. It appears to me that the bill was not paid by *Weston* and Co. on account of the defendants; but that the payment was a mere private transaction between *Jones* and the bankers. The testator put the bill into the hands of *Jones* for a special purpose, namely, to present it when at maturity, and he was not to cause it to be noted. Instead of retaining the bill in his own possession, he discounted it at the bank of *England*. On the day it became due, being anxious to get the bill back, he went to *Weston* and Co.'s and inquired whether, if he paid the amount, they would give him up the bill. Having received an answer in the affirmative, he sent the money, and obtained the bill. If the payment had been a payment in the usual course out of the funds of the defendants, the bankers would have retained the bill. I am clearly of opinion that this was not a payment of the bill by the defendants, and consequently that they failed to prove their second plea.

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BOSANQUET J. I am of the same opinion. It is clear that the payment of the bill by *Jones* was a payment made, not on account of the defendants, but in order that *Jones* might regain possession of it from *Weston* and Co. If the bankers had paid the bill on behalf of the defendants, it was their duty to retain it, and not to give it up to *Jones*.

ERSKINE J. The question on this issue is, whether the defendants paid the bill in due pursuance of their acceptance thereof. It appears that *Jones* having raised money on the bill, took it up when at maturity, and then returned it to the testator, who was at liberty, if he thought proper, to proceed upon it at any future period, either against the defendants or Dr. *Andrews*.

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MAULE J. I also think that there was no evidence to sustain the plea of payment. *Jones* having improperly discounted the bill, recovered possession of it by paying the amount, and then returned it to *Deacon*, the testator, leaving the defendants in the same situation in which they stood before.

Rule absolute.

Atcherley Serjt. and *Petersdorff*, on shewing cause against the rule obtained by the defendants, took a preliminary objection that it had been moved too late, not having been applied for during the first four days of the term. It is apprehended that the circumstance of the jury having found one issue for the defendants, which, if it could be supported, would dispose of the cause in their favour, did not take the case out of the general rule (a); but that they were bound to come to the court within the first four days of the term, and complain of the finding upon the fourth issue, which was in favour of the plaintiffs. [*Maule J.* The defendants' ground is, that by obtaining your rule, the time for obtaining their judgment was postponed.] The defendants might have moved *conditionally*, ac-

(a) In the case of two pleas each in bar of the whole action, where one of the issues taken upon the replications to such pleas, is found for the plaintiff, and the other for the defendant, the judgment would be, that the defendant go thereof without day. The defendant could not, it is conceived, bring a writ of error, *quia timet*, upon the insufficiency of the replication, the issue on which had been found for the plaintiff, on the ground that the plaintiff might possibly obtain a reversal of the judgment upon the other issue.

Where two pleas are pleaded, each in bar of the whole action, and to one plea there is a demurrer, on which the plaintiff has judgment, and upon the other an issue is joined, it would seem that the plaintiff may bring a writ of error upon the judgment on the demurrer without trying the other issue, inasmuch as the judgment on the demurrer is, unconditionally, that the defendant go thereof (*i. e.* of the whole action which is professed to be barred by the plea) *sine dic.*

according to the usual practice. They were fully aware of the intended motion on the part of the plaintiffs.

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Thesiger and *Hoggins*, *contra*, contended that it was not competent for the plaintiffs to take this objection after the period which had intervened since the granting of the rule. [*Tindal* C. J. At the time the rule was granted, we said that the objection should be open to the plaintiffs.] They then submitted that, although the court might think that they could not be heard on that part of the rule which asked for a new trial, they were entitled to support that part of the rule which sought to enter a verdict for the plaintiffs on the issue raised by the fourth plea.

TINDAL C. J. The rule for judgment expires on the fourth day of the term. This is a general rule which has been laid down by the courts (*a*), and it has been uniformly observed in practice, and I see no reason for departing from it in the present case. Where cross rules are sought for, each party must move within the four days.

BOSANQUET J. concurred.

ERSKINE J. There is the less reason for breaking through the general rule on the present occasion, as the defendants had notice, at the trial, that the plaintiffs would move.

MAULE J. concurred.

Rule discharged.

(*a*) See *Hil. T. 2 W. 4. c. 1.* only to motions in arrest of
s. 65., 8 *Bingh.* 297. That judgment, and for judgment
rule, however, applies, in terms, *non obstante veredicto*.

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Feb. 1.

M'LEOD v. M'GHIE.

In trover for an unstamped guarantee mutilated by the defendant, the plaintiff is entitled to such damages as he might have recovered in an action on the guarantee.

TROVER, for an agreement in writing of great value, to wit, of the value of 100*l.*, whereby the defendant agreed to become security to the plaintiff for half the amount of the moneys which might be advanced by the plaintiff to one *James Puxley*, not exceeding 100*l.* (a), and which were necessary to put the said *James Puxley* in possession of a certain public house, to wit, &c., and for a certain other paper writing of great value, to wit, &c., signed by the defendant, for the securing to the plaintiff the payment by the defendant of certain moneys therein mentioned.

Pleas: first, not guilty; secondly, that the plaintiff was not possessed; upon both of which pleas issue was joined.

At the trial, before *Coltman J.*, at the sittings at *Guildhall* in this term, it appeared that the defendant had given a guarantee to the plaintiff, in the form of a letter, as follows:—

30th November 1838.

Dear Sir. — Mr. *Puxley* informs me you are willing to pay for the fixtures of the public house, sign *Wheat-sheaf*, situated at *Rotherhithe*, if I will become security for half the amount of, say about 100*l.*, which I hereby engage to do.

I am, dear sir, your's truly,

B. A. M'Ghie.

Bentley M'Leod, senior, Esq.,
Stockwell.

(a) Quære, whether by this expression “not exceeding 100*l.*,” is meant “the money advanced” not exceeding, or

“the half of the money advanced” not exceeding, that sum? *Vide post*, 329.

This letter the defendant delivered to *Purley*, who delivered it to the plaintiff, who advanced 247*l.* 15*s.* 7*d.* to *Purley* for stock and fixtures, of which 147*l.* 19*s.* 10*d.* was for fixtures. Some time afterwards, the plaintiff observing that his father's christian name appeared in the letter instead of his own (a), sent his clerk to the defendant's counting-house to get it altered. The defendant not being at home, the guarantee was left with one of his partners. The defendant, upon receiving it, altered it by inserting the word "*Stockwell*," which was the residence of the plaintiff's father, the plaintiff residing at *Camberwell*, but upon being applied to on the part of the plaintiff to return the guarantee, he refused to do so, and afterwards struck out his signature.

The learned judge told the jury that, inasmuch as the defendant had mutilated the instrument which, if it had remained in its original state, the plaintiff might have caused to be stamped and put in suit against the defendant, the plaintiff was entitled, in this action, to the amount of damages which he might have recovered in an action upon the guarantee. The jury having returned a verdict for the plaintiff, damages 100*l.*,

Talfourd Serjt. now moved for a new trial, on the ground of misdirection. The plaintiff was entitled to nominal damages only, the paper in question being unstamped. It is not contended that trover will not lie for an unstamped paper; *Mercer v. Jones* (b); but the value of the instrument must be taken as it stood at the time of the conversion, at which time no action could have been maintained upon it. [*Maule* J. It was worth at that time to the owner as much as it would enable him to obtain by means of an action, deducting the ex-

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(a) As to the effect of such a misnomer, see *Doe dem. Le Chevalier v. Huthwaite*, 8 Taunt. 306., 2 B. Moore, 304.; S. C. in error, 8 B. & Ald. 632.
(b) 3 Campb. 477.

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pense of stamping.] Supposing the jury to have been entitled to give damages for what the plaintiff might have recovered upon the guarantee when stamped, they should have been told that they ought to find a verdict in the alternative for 100*l.* if the defendant did not give up the paper; and if he did, then for 1*s.* only. (a)

TINDAL C. J. The defendant has damaged the plaintiff by his wrongful act in mutilating the instrument. I think, however, that the damages should be reduced to 50*l.*

BOSANQUET, ERSKINE, and MAULE JJ. concurred.

Rule *nisi* for a new trial unless the plaintiff will consent to reduce the damages to 50*l.* (b)

(a) A jury cannot give a verdict subject to any contingency, except the decision of the court upon a point of law, as in the case of a special verdict. The mode in which the convenience of a contingent verdict is in fact obtained, is by taking a verdict for the full demand, the verdict being made, by agreement between the parties (generally embodied in an order of *nisi prius*), subject to reduction upon the performance of the agreement on the part of the defendant. But all this presupposes and proceeds upon the legal right of the plaintiff to have a verdict for the larger sum.

(b) If the plaintiff was only entitled to recover from the defendant the half of 100*l.* under the guarantee, he might be said to have gained or saved 6*l.* by the mutilation, viz. 1*l.* which he would have had to pay for the agreement stamp, and 5*l.* for the penalty. But it cannot be assumed that the defendant would have pleaded a false plea of non-assumpsit; and in the absence of such a plea no stamp would have been necessary. Besides which, to give the defendant the advantage of the deduction of the 6*l.*, would have been to enable him to benefit by his own wrongful act.

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PARKINSON v. CHARLES WHITEHEAD, Executor
of WILLIAM WHITEHEAD Deceased.

Jan. 20.

ASSUMPSIT. The declaration stated, that there-
tofore, to wit, on the 31st of *May* 1825, by a cer-
tain memorandum of agreement in writing then made
by and between the plaintiff and *William Whitehead* in
his lifetime, now deceased, the plaintiff for himself, his
executors, administrators, and assigns, agreed to let,
and the said *W. Whitehead* for himself, his executors,
administrators, and assigns, agreed to take, a certain
piece or parcel of ground, more particularly described
in a certain plan annexed to and referred to in and by
the said agreement; to hold the same *for a term of*
eighty-four years from Midsummer then next; paying for
the first two years and a half of the said term the rent
of a pepper-corn only, and for the residue of the said
term the net annual ground rent of 250*l.*, payable half
yearly, free and clear from all deductions or assess-
ments, parliamentary, parochial, or otherwise; the first
half-yearly payment to become due at *Midsummer* 1828;
and the said *W. Whitehead*, in and by the said memo-
randum of agreement for himself, his executors, ad-
ministrators, and assigns, agreed, *within two years from*
Midsummer then next, to erect and build so many third
and fourth rate houses or stables as should cover the
respective frontages, as marked on the said plan annexed
to the said memorandum of agreement as aforesaid, and
to build them of fit and proper materials of their re-
spective kinds, to a plan and elevation first to be ap-
proved by the plaintiff, his executors, administrators,
and assigns; the third rate houses to have basement

The declar-
ation stated,
that there-
tofore, *to wit*,
on the 31st of
May 1825,
by an agree-
ment in writ-
ing, the de-
fendant's
testator
agreed within
two years
from *Mid-*
summer then
next, to build
certain
houses; and
alleged for
breach, that
the houses at
the com-
mencement of
the action
(1839) were
unbuilt, con-
trary to the
agreement:
Held bad on
general de-
murrer, for
not shewing
that two years
from *Mid-*
summer next
after the
making of the
agreement
had elapsed
previous to
the com-
mencement of the suit.

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stories, and to be faced with second malm bricks, coped with stone, and the roofs to be slated. Mutual promises. Averment—that *W. Whitehead* entered and became possessed of the term, and continued so possessed for a long time, to wit, until the 31st of *May* 1828, when he died, and all his estate, &c. of, in, and to the said piece or parcel of ground came to and vested in the defendant, as executor as aforesaid; by reason whereof the defendant as executor as aforesaid, afterwards, to wit, on the day and year last aforesaid, entered into and upon all and every part and parcel of the said demised piece or parcel of ground, and became and was possessed, and from thence thitherto had been and still was possessed thereof for the residue of the said term, so to the said *W. Whitehead* thereof granted as aforesaid. The declaration, after averring performance of the agreement by the plaintiff, alleged for breach,—that neither the said *W. Whitehead* in his lifetime, nor the defendant, as executor as aforesaid, since the death of the said *W. Whitehead*, although often requested so to do, did or would erect, or build any third or fourth rate houses or stables, as would cover the respective front-ages, as marked on the said plan so annexed and referred to in and by the said agreement as aforesaid, but on the contrary thereof, had, and each of them had, wholly neglected and refused, and the same and every part thereof, at the time of the commencement of the suit, were and was unbuilt, contrary to the tenor and effect of the said agreement (a);—that after the making of the said agreement, and during the said term thereby

(a) Point marked for argument, on the part of the defendant; that this breach was ill assigned, because it did not state that two years from *Midsummer* next after the making

of the memorandum of agreement, or any other time after the making of the agreement had elapsed before the commencement of the suit.

granted, and after the defendant became such executor as aforesaid, to wit, on the 24th of *June* 1839, a large sum of money, to wit, 500*l.* of the rent aforesaid, for two years of the said term, ending on the day and year last aforesaid and then last elapsed, became and was due, and still was in arrear and unpaid to the plaintiff, contrary to the tenor and effect, true intent and meaning, of the said memorandum of agreement so in that behalf made as aforesaid.

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The defendant pleaded; thirdly, *nil habuit in tenementis*; which plea was traversed by the plaintiff's replication, to which the defendant demurred specially.

The defendant, to the breach assigned for non-payment of rent, pleaded, fifthly, a grant of the rent to one *Wilson*, by a deed indented and *signed* by the plaintiff; to which plea the plaintiff replied by tracing down the title of the property, so as to shew that there was no reversion in the plaintiff, and concluding with a special traverse of the grant. To this replication there was a special demurrer. To the same breach the defendant pleaded, sixthly, a grant of the reversion to *Wilson* by a deed indented and *signed* by the plaintiff; to which plea there was a special demurrer.

Stephen Serjt. (*Atkinson* was with him), for the plaintiff, submitted that the above pleas were bad, and contended that the replications to the third and fifth pleas were sufficient; but as the decision of the court turned upon the declaration, the arguments and authorities advanced by either side on these points are omitted.

Channell Serjt. (*Willes* was with him), *contra*, after insisting that the pleas were good, objected that the declaration was defective, inasmuch as it contained no allegation that the two years from "*Midsummer* then next" had elapsed before the commencement of the

1841. action. *Sansom v. Rhodes*. (a) [Maule J. The question is whether the court may not look at the date of the agreement, in order to see if the two years have not elapsed.] No case can be found where the want of an express allegation is cured by a reference to dates. Here, the date of the agreement being stated under a *videlicet*, it is not traversable, and the plaintiff may prove a different date.

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Stephen Serjt., in reply on this point, contended that the declaration was sufficient. It is submitted that the two years from *Midsummer* next must mean from *Midsummer* 1825; for the declaration states, that by an agreement in writing made on the 31st of *May* 1825, *William Whitehead* contracted to build the houses. [Tindal C. J. The allegation in effect is that the houses were to be built within two years from the *Midsummer* next after the making of the agreement, but the date of the agreement being laid under a *videlicet*, the time when the agreement was made is uncertain.] Although a date stated under a *videlicet* may be immaterial for the purpose of proof, yet it has never been understood to be immaterial with respect to an objection arising on the face of the record. [Erskine J. Is this allegation any thing more than an averment that the houses were to be built within two years from *Midsummer* next after the making of the agreement, — whenever that might be? Maule J. The question is, whether when a thing is averred that is material, the allegation of it under a *videlicet* makes it immaterial. (b)] The court will not hold the date immaterial *quoad hoc*. At any rate it will look at the date of the declaration. In *Owen v. Waters* (c), which was an action on a bill payable four months after date, it was held unnecessary to aver that the four

(a) 6 *New Ca.* 621.; 8 *Scott*, 544.

(b) 2 *Wms. Saund.* 290a (1).
(c) 2 *M. & W.* 91.

months had elapsed before the commencement of the suit. In *Webb v. Pritchett* (a), in an action on an attorney's bill, the nisi prius record was held to be *prima facie* evidence, that the action had not been commenced until after the expiration of a month from the delivery of the bill. [*Bosanquet* J. Here you have the *terminus ad quem*, but you do not shew the *terminus a quo*. *Tindal* C. J. If you had gone to trial, this allegation would have been satisfied by proof of an agreement made in 1837.]

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Stephen Serjt. then prayed leave to amend, which the court granted on payment of costs, the defendant to be at liberty to plead *de novo* to the amended breach.

Rule accordingly. (b)

(a) 1 B. & P. 263.

(b) As to the necessity of shewing a breach before action, see *Com. Dig. Pleader* (2 V.2.),

Action (E), — as to aider of defects by verdict, *Bac. Abr. Pleas and Pleadings* (I) 4., *Verdict* (X); 1 M. & R. 285. n.

EDWARD BATCHELOR v. JOSEPH DUDLEY.

Jan. 12.

DEBT, for goods sold and delivered. Pleas: *nunquam indebitatus*, and payment before action brought. The replication joined issue on the first plea, and denied the payment; on which issue was joined.

At the trial before the undersheriff of *Staffordshire*, the plaintiff gave credit for 3*l.*, and sought to recover a balance of 2*l.* 8*s.* 9*d.*, being the sum indorsed on the writ of summons. The person who served the writ proved, that the defendant acknowledged that he "owed the money," but it did not appear that any precise amount was stated, or that the defendant saw the in-

In an action of debt tried before the sheriff, where the verdict is for 1*s.*, the court has no power to stay the proceedings on payment of the amount of the verdict, or to direct that judgment shall be en-

tered for the plaintiff without costs.

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dorsement; and the plaintiff not being prepared with other evidence of the debt, a verdict was found for him for 1s. debt and 1s. damages.

In *Michaelmas* term, *Wilde*, Solicitor-General, for the defendant, moved for a rule to shew cause why the proceedings should not be stayed upon payment of the debt and damages found by the jury, or why judgment should not be entered for the plaintiff without costs, on the ground that, under the statute of 43 *Eliz. c. 6.* the sheriff could not certify to deprive the plaintiff of costs.

It was shewn by affidavit, that the further and better particulars of the plaintiff's demand, after specifying the items of the plaintiff's demand, concluded as follows:—

Gross amount	-	-	-	£ 5	8	9
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Credit by cash, on account, as follows:—

1839, <i>July</i> 6th, by cash on account	£1	10	0
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20th, by cash on account	1	0	0
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<i>Aug.</i> 9th, by ditto on ditto	0	10	0
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				3	0	0
--	--	--	--	---	---	---

Balance due and sued for	-	£2	8	9
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And that the defendant resisted the sending of the case to be tried before the sheriff, alleging that the plaintiff could not recover 40s., and that the sheriff could not certify. The plaintiff represented to the learned judge who granted the writ of trial, that the debt exceeded 40s. A rule *nisi* having been granted,

Talfourd Serjt. now shewed cause upon an affidavit from the plaintiff, which stated that the defendant was indebted to the plaintiff at the commencement of the suit in 2l. 8s. 9d., and that the application to try before the sheriff was made in the full belief and expectation that the plaintiff would recover the whole of that sum. This case does not come within any statute enabling the court to grant the application. It is not within

the 43 *Eliz.*; and, if it were, there are no circumstances which should induce the court to interfere. The inability of the plaintiff to shew the amount of the debt remaining due to him, arose from a circumstance over which he had no control. Neither is the case within the 3 & 4 *Vict. c. 24.*, which applies only to trespasses and torts.

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Wilde Solicitor-General, *contra*, in support of the rule. The plaintiff gave the defendant credit for 3*l.*, and it was not shewn that any thing was due to him beyond that sum. [*Maule* J. The defendant admitted that *something* was due.] It has been held, in the court of Exchequer, that the sheriff cannot certify under the statute of *Eliz.* [*Maule* J. The object of this application seems to be to cure a defect in the statute law.] The defendant objected to the writ of trial issuing, but the objection was overruled upon the plaintiff undertaking to prove a debt for 2*l.* 18*s.* 9*d.*, which he has failed to do.

TINDAL C. J. I think that we have no authority to grant this application. Neither, supposing we had the power, does it seem to me to be a case in which we ought to interfere. It is said that the plaintiff has been guilty of a breach of good faith. I do not see that this charge is made out by the affidavits. The action was brought to recover 2*l.* 8*s.* 6*d.*, the sum indorsed on the writ of summons. The plaintiff might well suppose that the acknowledgment, made at the time of the service of the writ, referred to the amount of the sum indorsed. The plaintiff seems rather to have been taken by surprise.

Per curiam.

Rule discharged, with costs. (a)

(a) *Vide Jones v. Barnes*, 2 *Mees. & Welsb.* 313.; S. C. by the name of *Jones v. Bond*, 5 *Dowl. Pra. Cas.* 455.; *Pritchard v. M'Gill*, 2 *M. & W.* 380.; 5 *Dowl. P. C.* 731. And see *Wardroper v. Richardson*, 1 *Ad. & Ell.* 75.; 3 *Nev. & Mann.* 889.

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Jan. 24.

HIGGINS v. STANLEY.

Where notice of trial has not been given, two clear terms after issue joined must elapse before the defendant is entitled to move for judgment as in case of a nonsuit.

GLOVER Serjt. shewed cause against a rule *nisi* obtained by Channell Serjt. for judgment as in case of a nonsuit. The motion was made too soon. The venue is laid in *London*, and issue was joined on the 1st of *June* 1840. One whole term was only allowed to elapse. But, this being a town cause, and no notice of trial having been given, the plaintiff was entitled to two full terms before judgment as in case of a nonsuit, could be obtained. The defendant was bound to wait until the third term after issue joined; *Fox v. M'Culloch* (a); *Gough v. White*. (b) In the latter case the court of Exchequer took time to consult the other judges, in order that the practice might be uniform; and the decision was, that no motion for judgment as in case of a nonsuit could be made until two terms had elapsed after issue joined. There must have been a default. But no default occurred in this action until the third term after issue joined, as notice of trial had not been given. The plaintiff was only bound to take one step in a term; *Wingrove v. Hodson*. (c) In a recent case, *Duggan v. Wilbraham* (d), it was held that the plaintiff was entitled to two terms, unless notice of trial had been given.

Channell Serjt. admitted that the rule could not be supported, as notice of trial had not been given.

TINDAL C. J. The proceedings in this cause are manifestly irregular. Where notice of trial has not

(a) 5 Dowl. P. C. 526.

(b) 2 Mees. & Wels. 363.

(c) 2 Dowl. P. C. 379.

(d) *Antè*, Vol. I. 240.

been given, two clear terms must elapse after issue joined, before judgment as in case of a nonsuit, can be obtained. The rule, therefore, must be

Discharged with costs.

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GLYNN v. HOUSTON, Bart.

Jan. 25.

TRESPASS, for assault and false imprisonment.

Plea: not guilty; on which issue was joined.

At the trial, before *Erskine J.*, at the sittings in *London*, after *Trinity* term, 1839, the following facts appeared in evidence:—

In *November* 1831, the plaintiff, a *British* merchant, was residing at *Gibraltar*, of which the defendant was the lieutenant-governor, acting as governor. On the 3d of that month, between the hours of eleven and twelve in the day, Colonel *Mair*, the military secretary of the

In an action against the governor of *Gibraltar*, for assault and false imprisonment, it was proved that a party of soldiers, under the command of his military secretary, surrounded

the plaintiff's house, and that while a search was making in the adjoining house for a *Spaniard* who was suspected to be concealed there, the plaintiff, in attempting to leave his house, was prevented from so doing by a sentinel placed at the door, who compelled him to return.

It was also proved, that the defendant had repeatedly expressed a desire to apprehend the *Spaniard*; that his secretary, being unattached, could not employ the troops on such a service except by his directions, and that the defendant had never called his secretary to account for what had occurred. It further appeared, on the evidence of the plaintiff's brother, that the plaintiff had told him, that the defendant expressed to the plaintiff his regret at having been obliged to direct the search. No evidence was given on the part of the defendant.

The jury having returned their verdict for the plaintiff; it was held, that they were warranted in coming to the conclusion that the defendant had ordered the search, and that the act complained of was a necessary consequence of the defendant's orders.

The plaintiff's brother (who was examined on interrogatories), having been asked upon cross-examination as to some particulars of a conversation which the plaintiff had told him, he, the plaintiff, had held with the defendant, and being asked, on re-examination, to detail the whole conversation, stated that the plaintiff had informed him that the defendant had expressed his regret at being obliged to direct the search. Held: that this evidence was admissible.

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defendant, surrounded the plaintiff's premises with a detachment of troops, and searched a house immediately adjoining, for the person of *Torrijos*, a *Spanish* general, who was suspected to be secreted there. During the search, which proved to be unsuccessful, the plaintiff, on attempting to leave his house, was prevented from doing so by a sentinel placed at the door, who, presenting his fixed bayonet, compelled him to return; which was the assault and imprisonment complained of in the present action.

To shew that the defendant had directed the search, it was proved that he had often expressed a wish to arrest General *Torrijos*; that Colonel *Mair* (who had died previously to the commencement of the action) was his military secretary, and was unattached; that Colonel *Mair* had demanded, and had obtained, the command of the soldiers employed on the occasion, from their officer, Lieutenant *Spiller*; and also that the search could not have taken place without the authority of the defendant as governor.

The examination of the plaintiff's brother upon interrogatories, was also given in evidence; from which it appeared that, having been asked, in cross-examination, whether the plaintiff had not informed him, that in a conversation which he had with the defendant shortly after the transaction in question, the plaintiff had admitted that General *Torrijos* had been concealed, either in his house or in the adjoining premises, but which the brother denied; the latter was asked, on re-examination, to state the whole of the conversation, as related to him by the plaintiff. He replied that his brother, among other things, told him that the governor had expressed his regret that he had been obliged, by orders received from *England*, to direct the search.

A statement by the brother, that about a month after the transaction took place, the plaintiff's wife was pre-

maturely delivered of a child, which died of convulsions when four months old, was also received in evidence, although it was objected to, on the part of the defendant, as being wholly irrelevant, and only calculated to prejudice the jury, and to inflame the damages.

No evidence was given on the part of the defendant; but it was contended that, even assuming the search for General *Torrijos* to have been directed by the defendant, still the assault and imprisonment of the plaintiff were not the necessary or probable consequence of the orders given by the defendant to search the house adjoining that of the plaintiff.

The learned judge left two questions to the jury: first, whether the search made by Colonel *Mair* was by the orders of the defendant; and, if so, secondly, whether the assault and imprisonment of the plaintiff were the necessary consequence of such orders; adding, that when a party authorises an act to be done by another, he is responsible for all that the other does in the necessary execution of his authority; and that it was for the jury to say whether the refusal to allow the plaintiff to leave his house during the search, was necessary to the due execution of the orders given to Colonel *Mair*.

With reference to the evidence of the plaintiff's brother, the learned judge said, that, although legal evidence, yet, as the statement of the plaintiff was not made upon oath, it was entitled to very little weight.

With respect to the premature confinement of the plaintiff's wife, and the subsequent death of the child, the learned judge told the jury that, although at the time when such evidence was offered, he could not refuse to receive it, they must dismiss it from their recollection; as there was nothing to connect it with the assault and imprisonment complained of in the

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1841. action. The jury having returned a verdict for the
— plaintiff, damages 50*l.*,

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Campbell, Attorney-General, in *Michaelmas* term, 1839, moved for a new trial, on the ground that evidence had been improperly received; that the jury had not been properly directed; and that the verdict was not warranted by the evidence. He contended that the way in which the evidence had been submitted to the jury amounted to a misdirection.

TINDAL C. J. It seems to me that the evidence was properly admitted. That part of it relating to the premature confinement of the plaintiff's wife, and the death of the child several months after the assault and imprisonment complained of, undoubtedly had little or no bearing on the issue; but it was impossible to say, when it was offered, that some other evidence might not be given to render it applicable; and the remarks made upon it by the learned judge were such as to prevent it having any effect on the jury. I am also satisfied with the way in which the case was left to the jury. The question was so mixed up with law and fact, that it could hardly have been submitted to them in any other manner. I think, however, that the rule may be granted, on the ground that the verdict was against the evidence.

BOSANQUET, COLTMAN, and ERSKINE JJ. concurred.

Wilde, Solicitor-General, and Sir *F. Pollock*, now shewed cause. It is submitted that the verdict was fully justified by the evidence. The defendant was the lieutenant-governor of *Gibraltar*, and had the sole control of the garrison. It was proved that he had repeatedly expressed his wish for the apprehension of the *Spanish*

general. The soldiers who made the search were commanded by Colonel *Mair*, his military secretary, who, being unattached, had no authority to act except by the orders of the defendant. The search was made in the middle of the day, and must have been known to the governor; no notice, however, was ever taken of it, and no complaint made that Colonel *Mair* had been guilty of any impropriety in calling out the troops upon that occasion. It would have been the duty of the defendant, where the rights of a *British* subject had been invaded by persons under his command, to institute an inquiry; he could not have passed over the transaction in silence, if it had not taken place by his directions. This evidence, independently of that given by the plaintiff's brother, was sufficient to warrant the verdict found for the plaintiff. Then, with respect to the brother's evidence, when he was asked on cross-examination as to part of a conversation between the plaintiff and the defendant, the plaintiff was entitled, on re-examination, to have the whole of the conversation detailed. [*Ers-
kine* J. It was not objected to on the part of the defendant. *Tindal* C. J. The conversation was made evidence by being brought out on cross-examination.] It is apprehended that it was evidence, in the strictest sense of the word, and it went to the jury accompanied by observations from the learned judge, which cut down its effect to the lowest possible degree. Although it may not, in itself, be entitled to much weight, yet if the other facts in the case leave no moral doubt that the search was directed by the defendant, the declaration of the latter, when once received in evidence, is amply sufficient to sustain the verdict. If this declaration be not evidence, it should have been objected to at the time; the defendant cannot be allowed to take his chance of a verdict, and then come to the court and say that the evidence should not have been received. Suppos-

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ing the search to have been directed by the defendant, it is clear that he is responsible for all that was done in order to render the search effectual. There can be no doubt, that the preventing of the plaintiff from leaving the premises while the search was proceeding, was a necessary consequence of the duty entrusted to Colonel *Mair*; and it was so found by the jury. It is submitted, that there was abundant evidence for them on both of the points left to them. The proposition on the other side seems to be, that although there was evidence to go to the jury, there was not sufficient to warrant the verdict for the plaintiff. It is conceived, that a defendant cannot have a new trial on the ground that the verdict is against the evidence, in a case where the judge could not have nonsuited the plaintiff, and where no evidence was offered on the part of the defendant.

Campbell, Attorney-General, and *Ludlow* Serjt., in support of the rule. Supposing an illegal act to have been committed on the plaintiff during the search for General *Torrijos*, the defendant cannot be held responsible. The fact that the defendant may have expressed a desire to apprehend the *Spaniard*, is no evidence to prove that he directed the search. Neither does the circumstance of the defendant being the governor of *Gibraltar*, or of Colonel *Mair* being his military secretary, raise any presumption that he authorised the search to be made. It is said that the defendant never instituted any inquiry, or brought Colonel *Mair* to trial for the outrage. The defendant, however, was not likely to punish Colonel *Mair*, and still leave him liable to an action at the suit of the plaintiff. Independently of that given by the plaintiff's brother, it is clear there was no evidence to justify the verdict. Assuming that the brother's evidence was properly received, and

that it established that the defendant directed the search, there is no pretence for saying that he authorised the act of which the plaintiff complains. All that the defendant can be held liable for is that which is necessarily, and not that which may possibly be, done in the execution of his orders. It cannot be said that the assault on the plaintiff was a necessary, or even a probable, consequence of the search. It is impossible to maintain the proposition contended for on the other side, that where the judge cannot nonsuit the plaintiff at the trial, the verdict must stand. [*Tindal* C. J. The proposition was restricted to a case in which no evidence was given for the defendant.] Even taking it with that restriction, the proposition cannot be supported. A mere *scintilla* of evidence will prevent a plaintiff from being nonsuited, although it be utterly insufficient to warrant the jury in giving him a verdict. The same evidence is required in an action for false imprisonment as would be necessary to support an indictment, and it is clear that no indictment for an assault could have been maintained against the defendant upon such evidence as was given in this case.

TINDAL C. J. The only point for our consideration is, whether the verdict found for the plaintiff is so unsatisfactory that justice can only be done by sending the case before another jury. I see no reason for granting a new trial. The question is, whether sufficient evidence was given to warrant the jury in coming to the conclusion, that the assault and imprisonment complained of were authorised by the defendant. If any reasonable evidence was given on the part of the plaintiff, and no attempt was made by the defendant to rebut it, we ought not to send the cause down again. Now, supposing the evidence of the plaintiff's brother, on his cross-examination and re-examination, was properly

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received, no objection can be taken to the result at which the jury have arrived. It was competent to them to credit or discredit his testimony; they appear to have believed that the conversation, said to have occurred between the plaintiff and the defendant, really took place, and the other facts in the case make it extremely likely that it did. The defendant had repeatedly expressed a desire for the apprehension of the *Spanish* general. The soldiers employed to make the search were not called out in the regular manner, but were commanded by Colonel *Mair*, the military secretary of the governor, who was unattached. These were all strong circumstances tending to shew that the search was made by the directions of the defendant; and they might very properly weigh with the jury, when they were considering whether the statement of the plaintiff, as detailed in his brother's evidence, was correct. Assuming that there was evidence that the *search* was made under the authority of the defendant, the next question is, whether the *act complained of* by the plaintiff was within the scope of that authority. It appears that the object was, not to search the plaintiff's house, but the one immediately adjoining; that the person of the *Spanish* general was unknown to the soldiers; and that the plaintiff, on attempting to leave his residence, was compelled to return. The question, whether this act, which undoubtedly amounted to an assault and false imprisonment, was within the scope of the orders given by the defendant, was explicitly left to the jury, who were as likely to come to a correct conclusion upon it as the court could do. I do not see that there is any ground for calling upon us to disturb the verdict.

BOSANQUET J. I also am of opinion that there is no ground for disturbing the verdict. It cannot be disputed that the assault and imprisonment complained of

by the plaintiff were illegal; and the only question is, whether they were authorised by the defendant. On the cross-examination of the plaintiff's brother, he was questioned as to a conversation which his brother had told him had occurred between himself and the defendant. Upon re-examination, the brother was asked to detail the whole of the conversation, when he stated that his brother informed him that the defendant had expressed his regret that he had been obliged to direct the search. It appears to me that this declaration of the plaintiff was evidence to go to the jury, who were at liberty to believe or to discredit it, as they thought proper. They seem to have believed it; and there is nothing unreasonable in their having done so. The troops that surrounded the plaintiff's house were under the immediate direction of the military secretary of the defendant, who had been frequently heard to express the desire to capture the *Spanish* general. Although the act complained of was committed by the military under the command of his secretary, it did not appear that the defendant had ever disavowed it, or had ever expressed any disapprobation of, or censure on, what had been done. The jury, therefore, taking these circumstances into consideration, might well believe that the conversation, represented to have taken place between the plaintiff and the defendant, had really occurred. I think the rule should be discharged.

ERSKINE J. I also am of opinion that this rule should be discharged. It appeared to me at the trial, that, independently of the cross-examination and re-examination of the plaintiff's brother, there was evidence to go to the jury. The defendant had expressed a desire to apprehend General *Torrijos*, and the search was avowedly for the purpose of seizing him. The person commanding the troops employed in the search was

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the military secretary of the governor, who had no military authority but what he derived from the defendant, and no right to take the command of the troops except by his directions. Colonel *Mair* went to Lieutenant *Spiller*, and demanded that the troops should be placed under his command. The transaction took place in daylight, and must necessarily have been known by the defendant, yet it appears that he never called Colonel *Mair* to an account for what had occurred. I think that these circumstances were evidence to go to the jury from which they might fairly conclude that the search was made under the orders of the defendant. Then, it is said, that even assuming that the search had been directed by the defendant, his orders did not necessarily extend to preventing persons from leaving the house. But it would be idle to send soldiers to surround a house, and search for a person whom they might not know, if they were not to have power to prevent the egress of any party. The jury, therefore, came to the conclusion, and, as it seems to me, very properly, that it was a necessary part of the orders given by the defendant, that persons attempting to leave the house should be stopped. I do not lay any great stress upon the cross-examination and re-examination of the plaintiff's brother, and I certainly gave a strong direction to the jury not to place much reliance on what was said to have passed between the plaintiff and the defendant.

MAULE J., having been counsel in the cause, gave no opinion.

Rule discharged.

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DANIELS v. COOMBE.

Jan. 27.

ASSUMPSIT, on a bill of exchange, dated the 16th March 1840, for 100*l.*, drawn by *T. Atkinson*, payable to his own order, at three months after date, upon, and accepted by, *T. Dann*, and successively indorsed by *Atkinson*, by *T. W. Milner*, by the defendant, by *P. J. Luntley*, and by *R. A. Phelps*, to the plaintiff.

The defendant pleaded, that he was induced and persuaded to indorse, and did indorse, the bill by the fraud, covin, and misrepresentation of the plaintiff, and the said *Luntley* and *Phelps*, and other persons in collusion with them, and without any value or consideration. Verification.

Replication: that the defendant did not indorse the said bill by the fraud, covin, or misrepresentation of the plaintiff, and the said *Luntley* and *Phelps*, or any or either of them, or by the fraud, covin, or misrepresentation of any other person or persons in collusion with them, or any or either of them; concluding to the country.

Special demurrer,—assigning for causes, that the replication, in traversing that the defendant indorsed the bill by the fraud, covin, or misrepresentation in the plea alleged, is bad, for that the traverse is a negative pregnant with an affirmative; and, further, that the traverse is pregnant with an admission, that there was some fraud, covin, or misrepresentation of the plaintiff; and, for that the replication has not traversed a material allegation in the plea, namely, that there was no value or consideration for the defendant's indorsement.

In assumpsit on a bill of exchange by the last indorsee against an intermediate indorser, the defendant pleaded, that he was induced to indorse the bill by the fraud, covin, and misrepresentation of the plaintiff and two others of the indorsers and other persons in collusion with them, and without any value or consideration. The plaintiff in his replication traversed the alleged fraud, &c., without replying to the allegation of absence of value and consideration. On special demurrer, Held good.

Channell Serjt. in support of the demurrer. It is submitted that the replication is bad, inasmuch as it

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does not traverse a material fact, and one which of itself is a sufficient answer to the action. The plea may be considered as disclosing two valid defences, namely, fraud and want of consideration. The plaintiff might have demurred specially to it for duplicity (*a*); but, as he has not done so, he was bound in his replication to negative the want of consideration as well as the alleged fraud. *Primâ facie*, an indorsement imports consideration; but if the contrary be clear, it constitutes a complete defence. [*Maule J.* It is not stated that the plaintiff took the bill without consideration, but that the defendant indorsed it without giving value. The transaction is one of every-day occurrence.] In *Isaac v. Farrar* (*b*), fraud and want of consideration were considered as amounting to one ground of defence; but there the replication was, *de injuriâ*. (*c*)

Manning Serjt., contra, was stopped by the court. (*d*)

Per curiam.

Judgment for the plaintiff. (*e*)

(*a*) See *Bolton v. Cannon*, 1 *Ventr.* 272.; *Chitty v. Dandy*, 3 *Ad. & Ell.* 819., 4 *N. & M.* 842.; *Eyre v. Shelley*, 6 *M. & W.* 274.

(*b*) *Tyrwh. & G.* 281.; 1 *M. & W.* 65.

(*c*) *Antè*, Vol. I. 720.

(*d*) On the part of the plaintiff, it would have been further urged, that the absence of consideration between the plaintiff and the defendant was wholly immaterial; as it must be taken upon the record that a

good consideration existed for the other indorsements, any one of which would, if fraud were negatived, be sufficient to support the title of the last indorsee.

(*e*) And see *Bennett v. Filkins*, 1 *Wms. Saund.* 22.; *Heydon v. Thompson*, 1 *Ad. & Ell.* 210.; 3 *N. & M.* 319.; *Brooks v. Stuart*, 9 *Ad. & Ell.* 855., 1 *Perry & Dav.* 615.; *Knowles v. Burwood*, 10 *Ad. & Ell.* 19.; *Knowles v. Burward*, 2 *Perry & Davison*, 235.

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CURLING v. EVANS.

Jan. 30.

WILDE, Solicitor-General, moved for a rule calling upon the defendant to shew cause why the master should not review his taxation of costs in this case. It was an action against the sheriff for not arresting a party, and also for an escape. On the day upon which the trial was to take place, the plaintiff, owing to the absence of a material witness, was obliged to withdraw the record. On the taxation of the costs of the day, it appeared that a sum of 15*l.* was charged by the defendant for the costs of two sheriff's officers, to whom the execution of the writ had been directed in respect of which the action was brought. It was objected, on the part of the plaintiff, that these officers were inadmissible as witnesses, being immediately interested in the event of the suit, but the master allowed the sum claimed for their costs. [*Erskine J.* Could they not have been made good witnesses by a release?] That might be so, but until they had been rendered competent, the costs of their attendance could not properly be allowed. [*Maule J.* It was only reasonable that the defendant should have them ready at the trial.]

TINDAL C. J. If the cause had gone on, a release might have been given to them. I think that this is a case in which the master might exercise his discretion.

Rule refused.

In an action against a sheriff for not arresting, and for an escape, the plaintiff having withdrawn the record, the master, in taxing the costs of the day, allowed the costs of two sheriff's officers to whom the writ had been directed, and who had been in attendance as witnesses. The court refused to grant a rule to review the taxation, which was sought for on the ground that the parties were incompetent witnesses.

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Jan. 30.

BALLS *v.* SMYTHE.SPALDING *v.* SMYTHE.

Where affidavits contained scandalous and impertinent matter as to the way of life of the defendant, a female, the court granted a rule absolute in the first instance for referring them to the master.

WILDE, Solicitor-General, moved on behalf of the defendant in both of the above actions, that the affidavits filed on the part of the plaintiffs in the two cases (which involved a question of practice as to whether certain process had been properly served) should be referred to the master, on the ground that the affidavits contained scandalous and impertinent matter as to the way of life of the defendant, a female. He cited *Eastham v. Liddell* (a), and *Ex parte Le Heup* (b), to shew that, according to the practice in equity, the motion is of course, not requiring notice to be given to the opposite party.

Per curiam.

Rule absolute. (c)

(a) 12 *Ves.* 201.

(b) 18 *Ves.* 221.

(c) In *Coffin v. Cooper*, 6 *Ves.* 514., where one defendant moved that the answer of another defendant should be referred for scandal, Lord *Eldon* said; "I do not recollect an instance of an application by a

defendant; but I cannot conceive, that the court would not do it even without a motion, and that it is not competent to *any one* to apply; and I would not lay it down that a person, not a party to the record, could not."

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LITTLE, ROBERTS, and MITCHELL v. NEWTON.

Jan. 30.

18 Jan 729.

BY articles of agreement of the 15th of *January* 1840, between the plaintiffs and the defendant, a certain action depending in this court, and all matters of difference therein, as well as all other matters of difference, causes of action, sums of money, accounts, claims, and demands whatsoever between the said parties, were referred to the award, order, arbitrament, and final determination of *A. B.*, one of her Majesty's counsel learned in the law, and *John M'Clure*, of *London*, merchant, and *Judah Hart*, of *London*, merchant, or any two of them, so as the award of the said arbitrators, or any two of them, were made in writing under their hands, or the hands of any two of them, ready to be delivered &c. on or before the 17th of *March* 1840; with power for the said arbitrators to enlarge the said time; the costs of the said cause, including the costs of the special jury, to abide the event of the said award, provided the said arbitrators, or any two of them, should certify that the said cause was a fit and proper one to be tried by a special jury; and the costs of the award and reference, or in any manner re-

Where matters in difference are referred to the award of three arbitrators, or any two of them, two of such arbitrators cannot delegate their authority to the third, the parties to the submission having a right to the joint judgment of at least two of the arbitrators upon the points submitted to their decision.

Where, therefore, a submission had been made

to *A.*, a barrister, and *B.* and *C.*, two merchants, or any two of them, and after evidence had been given on each side, *A.* and *B.* agreed to make their award in favour of the plaintiffs for a certain sum, subject to the decision of *A.* upon a point of law, to which award *C.* did not altogether agree, but he agreed to the point of law being left to *A.*; and the latter, without any further communication with either *B.* or *C.*, decided the point of law for the plaintiffs, and drew up the award in their favour for the sum which had been mentioned, and after signing it at *Birmingham*, sent it to *London* to be executed, by whichever of the other arbitrators agreed with him, where it was executed on the following day by *B.*; the court set the award aside.

If *A.* and *B.* having finally agreed on the terms of the award when they last met, had affixed their signatures thereto at different places and times, *quære*, whether the award could have been objected to on that ground.

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lating thereto, to be in the discretion of the said arbitrators, or any two of them; and the said arbitrators, or any two of them, to direct by whom, or to whom, and in what manner, the same should be paid. (a)

The time for making the award having been duly enlarged, the two first-named arbitrators, on the 21st of *July* 1840, made their award, whereby they found "that the plaintiffs had a good cause of action against the defendant in respect of the demands in the declaration in the said action duly set forth; and that the pleas of the defendant in the said action pleaded had not been proved; and they assessed the damages in the said action at the sum of 827*l.* 3*s.* 5*d.*; and awarded the said damages to be paid by the defendant to the plaintiffs in respect of such action; and they certified that the said cause was a fit and proper cause to be tried by a special jury; and, with respect to the other matters in difference to them referred, the said arbitrators awarded that the defendant should pay to the plaintiffs such further sum as would (b), in the whole, amount to 4038*l.* 3*s.* 2*d.*, which said last-mentioned sum they determined to be the balance due to the plaintiffs from the defendant, both in respect of the said action and of all other matters in difference; and they further awarded that the defendant should pay to the plaintiffs the costs of the plaintiffs in respect of the reference and award, or in anywise relating thereto."

Bompas Serjt., in *Michaelmas* term last, obtained a rule, calling upon the plaintiffs to shew cause why the award should not be set aside, upon the grounds (among

(a) See this agreement more fully set out in some respects, *antè*, Vol. I. p. 976. *Little, Roberts, and Mitchell v. Newton.*

(b) The words "together

with the said 827*l.* 3*s.* 5*d.*," appear to have been accidentally omitted in this part of the award, 4038*l.* 3*s.* 2*d.* being the whole amount found by the arbitrators to be due.

others) that it was not made by any two arbitrators together ; but that it was made by the two arbitrators who signed the same, at different times and at different places.

On a subsequent day in that term *Wilde*, Solicitor-General, shewed cause, and *Bompas* Serjt., and *Bramwell* were heard in support of the rule. The court took time to consider : and, on the last day of the term, *Tindal* C. J. stated, that the court had determined to enlarge the rule until *Hilary* term, and to give the parties the opportunity of filing fresh affidavits, in order that the facts might be more fully stated.

An affidavit was accordingly filed in support of the rule, made by Mr. *Hart*, the arbitrator named by the defendant, who stated, — that after several meetings, and after evidence had been gone into on both sides, he received a note from the legal arbitrator, saying that he meant, at the next meeting, to ask Mr. *M'Clure* and the deponent to give him their views of the case, in order to be enabled, should they differ in opinion, to decide between them ; that the arbitrators, on the 14th of *July* 1840, met at the chambers of the legal arbitrator, when the latter asked Mr. *M'Clure* his opinion on the case, who said he considered that the full amount claimed by the plaintiff's ought to be paid by the defendant ; that the legal arbitrator then called upon the deponent for his opinion ; that the deponent entered fully into the case, giving his reasons why he had come to certain conclusions, part of which were in favour of the plaintiff's and part of the defendant, but that on one point he declined giving any opinion, it being strictly a point of law ; that the legal arbitrator then stated that *he should consider the case as closed*, that he would reflect on the observations of the deponent, and would *make up his mind on the case*, and, as to the point of law, that he must take the responsibility of the conclusion at which he might arrive upon it ; that during the meeting the legal arbi-

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trator did not give his opinion on the case, or express any opinion that could in any way lead the deponent to imagine whether he intended to decide for the plaintiffs or the defendant; and that no award or determination or decision was then made or agreed on by the arbitrators, or any two of them; that on the 21st of *July*, in consequence of a notice received from the clerk of the legal arbitrator, he attended at his chambers to execute the award, when he found that it had just been executed by Mr. *M'Clure*, as sent up from *Birmingham* by the legal arbitrator; that the clerk refused to let him see the award, but on its being taken up a few minutes afterwards by the solicitor for the plaintiffs, he was shewn a copy. The award appeared on the face of it to have been executed by the legal arbitrator at *Birmingham* on the 20th, and by *M'Clure* in *London* on the 21st, of *July*.

On the part of the plaintiffs an affidavit of their attorney was filed, containing the following statement, communicated to him by the legal arbitrator, which was confirmed by an affidavit from Mr. *M'Clure*. At the meeting of the 14th of *July*, it was agreed by all the arbitrators that the amount to be awarded to the plaintiffs, subject to the decision of the arbitrators upon two points, was 4038*l.* 3*s.* 2*d.*, the sum inserted in the award; that such points were, first, whether the plaintiffs were responsible for the acts and defaults of certain parties at *Calcutta*; and, secondly, whether due notices of dishonour of certain bills of exchange, had been given to the defendant; that the legal arbitrator, expressed an opinion to the effect, that he agreed with Mr. *M'Clure* in favour of the plaintiffs upon the merits; and that the plaintiffs were not responsible for the acts and the faults of the parties referred to; but as the counsel had cited numerous cases on the subject of notices of dishonour, he wished to refer to those authorities before he made

the award; that he then observed to the other arbitrators that he presumed whichever gentleman he disagreed with would not sign the award, and that both of them replied that they should not; that at such meeting all discussion was considered to be closed, and it was left to the legal arbitrator to prepare the award and forward it for execution by the arbitrator with whom he should agree; the point of law being left by the other two arbitrators solely to him for his decision.

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Wilde, Solicitor-General, and *E. V. Williams*, now shewed cause. The point raised by this rule seems directed merely to the manner in which the award was executed; namely, "that the award was not made by any two arbitrators together, but that the same was made by the two arbitrators who signed the same at different times and at different places." If that be so, then there is nothing in the objection. Supposing the two arbitrators who signed the award to have previously agreed upon the terms, there is no law that requires them to execute such award at the same time and place. In *Battye v. Gresley* (a), where the question was, whether a warrant, granted by commissioners of bankrupt to compel the attendance of a witness, had been properly issued; it was held, that the propriety of granting such warrant, being matter of discretion, must be determined upon by the commissioners acting together at one time; but that the mere act of signing their names to the warrant, might be done by them separately. Here, it appears from the affidavits on both sides, that all discussion on the terms of the award was considered closed at the meeting of the 14th of *July*, and that nothing remained to be done but the preparing of the award, which was intrusted to the legal arbitrator; and

(a) 8 *East*, 319.

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that the lay arbitrators concurred in leaving him to decide the point of law which had been raised, which it was competent to them to do. Although arbitrators may not agree to be guided by the opinion of a stranger, there is no objection here to the two lay arbitrators leaving the point of law to be determined by the barrister, who, probably, was chosen for the purpose of deciding any legal questions which might arise in the course of the investigation. There can be no doubt, from the affidavits filed on behalf of the plaintiffs, that the legal arbitrator and *M'Clure* had arrived at the same conclusion upon the matters of fact, and expressed their intention to make their award for the plaintiffs for the sum mentioned. *Hart*, according to his own shewing, expressed his opinion fully; and he does not swear that he expected any further meeting to take place. The making of the award by the two others could be no surprise upon him; and that his presence at the signing of it was immaterial, appears from *Goodman v. Sayers* (a), which is expressly in point. Sir *Thomas Plumer*, M. R., there says (b), "It certainly is true that if two arbitrators out of three meet alone, excluding the third, or not giving him notice, and if (c) they receive evidence or hear discussions without him, their proceeding is irregular. When the matter is referred to three, the arguments and the judgment of all three should be had recourse to in every stage. The cases referred to on the part of the plaintiff were instances of fraudulent contrivance to exclude the third; but, at all events, it is irregular not to give him notice. Here, however, all the evidence was heard, and all the substance of the business was settled in his presence; the rest, the signing the award, was a mere form; this they thought they were

(a) 2 *Jac. & W.* 249.
 (b) *Ib.* 261.

(c) *Sic.*

at liberty to do by themselves: they did not, however, act secretly, but determined in the manner in which they had previously informed him that they should. Then should the court set aside the award, on account of the absence of one arbitrator under these circumstances? The cases have never gone to that length." It is submitted that here every thing was done which was requisite to the validity of the award.

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Bompas Serjt. and Bramwell, in support of the rule. The objection is, not that the two arbitrators by whom the award was signed, did not execute it, but that they did not *make* it, together. With respect to the point of law, the two other arbitrators had no power to leave it to the decision of the third. His being a barrister does not vary the case. Although they might have agreed to adopt his opinion if it had been expressed in their presence, they could not delegate their authority to him, by agreeing to be bound by whatever he should determine. Could the legal arbitrator have left the facts to be determined by the lay arbitrators? An award must be according to the submission; and, here, the concurrence of, at least, two of the arbitrators was required. It is clear that no decision was come to by any two of the three arbitrators, upon numerous matters embraced by the award, which contained many things beyond the giving of the sum therein mentioned to the plaintiff. For instance, there appears to have been no discussion as to the question of costs, on which the arbitrators had ample discretion, and which the defendant, by the award, is required to pay. [*Tindal* C. J. If you meant to make this point, you should have raised it by your rule.] It is submitted that under the objection that the award was not made by two arbitrators together, the objection may be taken; for there was no award made in this re-

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spect. (a) *The King v. Forrest* (b) and *The King v. The Inhabitants of Great Marlow* (c), shew that where the concurrence of two or more individuals is required in a judicial act, it must be done by them together. So, in *The King v. Hamstall Ridware* (d), it was held, that an indenture of a parish apprentice, to which two justices had separately assented, was void. *Battye v. Gresley* is an authority to the same effect; for there the commissioners of bankrupt had deliberated and come to a determination, and all that remained to be done was the mere act of signing the warrant. Again, by the submission, the matters in difference were referred to the joint decision of the three arbitrators; and it was only in case of a *final* disagreement by them that two were empowered to make an award. It is clear that, here, there was no final disagreement. Therefore, even if there had been a determination, by two of the arbitrators, of the matters embraced by the submission, the award would still have been bad on that ground. This case is clearly distinguishable from *Goodman v. Sayers*; there the third arbitrator had declared that he would have nothing more to do with the reference. The facts of *In re Pering and Keymer* (e), bears a close resemblance to those of the present case. There the reference was to three arbitrators or any two of them; and Lord *Denman* says, "Any two, under such a submission as this, may make a good award: but then it must be after discussion with the other arbitrator. If after discussion, it appears that there is no chance of agreement with one of the arbitrators, the others may indeed proceed without him." Here, it cannot be said that the award signed by the

(a) From the judgment of the court, it would appear to have been ultimately considered that the point *was* open to the defendant. See *post*, p. 362.

(b) 3 *T. R.* 38.

(c) 2 *East*, 244.

(d) 3 *T. R.* 380.

(e) 3 *A. & E.* 245. ; 5 *N. & M.* 374.

two arbitrators was not made until after there was no chance of agreement with the third. With respect to the question, whether there was any award properly made even by the two, no such award was made at the meeting of the 14th of *July*. Was any such award made subsequently? The award now under discussion appears to have been published by the legal arbitrator at *Birmingham* on the 20th. [*Tindal* C. J. He did not publish it there; he sent it up to town by his clerk.] *Brooke v. Mitchell* (a) shews that an award is published as soon as it is signed by the arbitrator in the presence of the attesting witness. [*Bosanquet* J. That is when the award is signed by the requisite number of arbitrators.] The legal arbitrator might have wished to alter the award after he executed it, and before it was signed by the other arbitrator, but had not an opportunity. There is no presumption in favour of the award being the joint and concurrent act of the arbitrators who signed it; and the facts clearly shew the contrary. Independently of the point, whether or not arbitrators, who have previously come to a final determination, may sign the award at different times and places, it is submitted that here the two never finally concurred in the award to which their signatures are attached. The legal arbitrator appears to have considered himself rather in the light of an umpire than as one of the original referees.

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Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court.

This was a rule calling on the plaintiffs to shew cause, why the award made in this case should not be set aside, upon two grounds of objection. It is unnecessary to advert again to the first, which was a question of fact, and appeared to us, in the course of the discussion,

(a) 6 *M. & W.* 473.

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to be answered by the affidavits on the part of the plaintiffs; but the second objection, viz. that the award was not made by any two of the arbitrators, required further consideration. If this objection had rested on no other ground than this, that the two arbitrators who signed the award, after having agreed upon the terms of their award when they last met together, had affixed their respective signatures thereto at different places and different times, we might perhaps have hesitated in holding the award to be void on that objection. But upon looking at the affidavits in this case, we think the objection is of a more serious description. The result of those affidavits appears to be that, after the three arbitrators named in the submission had met and received evidence, and heard the parties, a meeting on a subsequent day, namely, the 14th of *July*, took place between all the arbitrators, for the purpose of considering the evidence, and determining the matters referred to them; at which meeting it was agreed by all three, that their award should be in favour of the plaintiffs, for a certain sum then stated, subject, however, to their decision on two points, namely, whether the plaintiffs were responsible for the acts and defaults of certain parties at *Calcutta*; and, secondly, whether due notice of the dishonour of certain bills of exchange had been given to the defendant; that at this meeting the arbitrator named by the plaintiffs declared it to be his opinion, that the full amount claimed by the plaintiffs ought to be paid to them, subject to the opinion of another of the arbitrators, who was a barrister, upon the point of law, whether due notice of dishonour had been given to the defendant, which question he left solely to the decision of that arbitrator; that the arbitrator named by the defendant, declared that his opinion on the case differed in many points from the opinion of the other arbitrator named by the plaintiffs; but that he

declined giving any opinion on the point of law, and referred that question wholly to the opinion of the barrister.

The barrister, before the breaking up of the meeting, and in the presence of the other two arbitrators, declared his agreement with the plaintiffs' arbitrator, and that he was of opinion with the plaintiffs on the merits, and that they were not responsible for the acts and defaults of the parties referred to. He then, however, gave no opinion as to the point of law, but expressed his wish to look into the authorities cited on the point, which he promised to do, and to make up his mind upon it; adding, that he presumed the gentleman with whom he might disagree would not sign the award, to which each of them declared that he should not; whereupon the arbitrators separated, considering all discussion of the matters between them at an end.

The award was then drawn up by the barrister at *Birmingham*, upon the principle stated by him in the presence of the two other arbitrators, with the addition only, that he decided the legal point in favour of the plaintiff. It was signed by him at *Birmingham*, and sent to *London* by his clerk, who sent a notice to the other two arbitrators to attend to execute the award and receive their fees; in consequence whereof the two arbitrators attended on the following day, when the award was executed by the plaintiffs' arbitrator, but was not then shewn to the defendant's arbitrator, who was refused permission to look at it. A copy of it, however, was given to him after it had been taken up by the plaintiffs.

This was the whole of the communication between the arbitrators subsequently to the 14th of *July*; and the question is, whether, upon this state of facts, the award is good?

It is quite clear, that the parties to a submission to a reference have a right to the joint judgment of the two

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arbitrators who sign the award, upon each and every point embraced by such award, after communication had between them, so as to insure an agreement of mind between them, upon each point, before the signing of the award. But in the present case, the determination of the point of law appears to have been the judgment of the legal arbitrator alone, who made no communication whatever of the conclusion at which he had arrived, to either of the two other arbitrators, but inserted his own determination in the award, and signed the same, before any such agreement had taken place. The award, thus prepared and signed by one arbitrator, was afterwards signed by another of the arbitrators; but was never shewn at all to the third arbitrator, until after it had been published. It is true, that both arbitrators, named by the plaintiff and defendant respectively, had declined to interfere on the question at law, and had given up their opinion to that of the third. But there is no principle of law, that we are aware of, which will authorise any such delegation of the judicial authority conferred upon the three; and it is impossible to say that, if the determination of the legal arbitrator had been disclosed to either of the other arbitrators before the signature of the award, some argument or observation might not have been made which would have led to a different conclusion.

Independently of this particular view of the case, it appears from the affidavit that the costs of the reference, which are left in the discretion of the arbitrators, and which are given by the award to the plaintiff, never formed the subject of any discussion or communication whatever between the arbitrators.

Upon these grounds we feel ourselves compelled to say, certainly with considerable reluctance, that the rule for setting aside the award must be made absolute.

Rule accordingly.

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MARGETTS v. COWLEY,

Feb. 1.

CHANNELL Serjt. had obtained a rule nisi to set aside a verdict found for the plaintiff in an action tried before the undersheriff of *Warwickshire*, on the grounds of misdirection, and that the verdict was against the evidence.

Wilde, Solicitor-General, now shewed cause. This rule was obtained upon an affidavit, setting out and verifying the undersheriff's notes, which are silent as to the mode in which the case was left to the jury. A charge of misdirection is not to be supported by the mere assertion of parties. But the undersheriff left the case to the jury upon the credit of the witnesses on the one side, and on the other, as now appears by affidavit.

Channell Serjt. objected to the reception of any statement of what occurred at the trial, which was not authenticated by the undersheriff.

TINDAL C. J. In the absence of any affidavit, shewing that the case was improperly left to the jury, it must be presumed that the case was properly left.

Rule discharged.

Where there is no affidavit shewing misdirection, the court will presume that the sheriff properly directed the jury.

Semble, that a rule nisi for a new trial, obtained on the ground of a misdirection in a case tried before the sheriff, may be answered by an affidavit shewing in what manner the case was left to the jury.

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BIGNALI. v. GALE.

A rule for setting aside an award cannot be argued on the last day of term.

So, though the objection to the award rests upon misconduct of arbitrators.

AT the sittings at *Westminster*, after *Hilary* term, 1839, this cause was referred to *C.*, a bookseller, and *H.*, a surveyor, and to *A.*, another surveyor, as umpire, in case the two arbitrators should not agree. The arbitrators, after twelve enlargements of time, made their award in favour of the plaintiff for 2736*l.*, on the 8th of *January* 1841; which award

Wilde, Solicitor-General, early in this term, obtained a rule nisi to set aside, upon the ground of alleged corruption on the part of *C.*

On this day *Wilde*, Solicitor-General, moved to make his rule absolute, when it was objected by

Atcherley Serjt., that an argument upon a rule for setting aside an award cannot be heard on the last day of term; and he referred to *Tidd's Practice*, 498. (a)

Wilde, Solicitor-General. It is laid down that no motion to set aside an award can be made on the last day of term; *Nettleton v. Crosby* (b); but it has never been held that the rule may not be *argued* on that day. It is also an established rule that matters of law cannot be discussed on the last day of term (b); but, here, the objection to the award involves no question of law: it rests solely on the alleged misconduct of one of the arbitrators.

(a) 6th ed. 522., 9th ed. 498. The only authority referred to for this position by Mr. *Tidd*, is the rule of *M. 36 G. 3. K. B.*, as to which see *post*, 365. (b)

(b) *H. 38 G. 3. K. B.*; *Tidd's Practice*, 6th ed. 522., 9th ed. 498. That was a decision in the court of King's Bench subsequent to the above rule.

TINDAL C. J. This rule must be enlarged. In *Watkins v. Phillpotts* (a) *Hullock* B. says, "No questions on awards (b) are heard in any court in *Westminster Hall* on the last day of term."

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BOSANQUET and ERSKINE JJ. concurred.

MAULE J. By a rule of *M. T. 36 G. 3. (c)*, it is ordered that no counsel shall be heard on the last day of term, to shew cause against a rule to set aside an award; but the same shall be enlarged and made a peremptory for the next term.

Rule enlarged. (d)

(a) *M'Clelland & Younge*, 393.

(b) The language of the learned baron is general, but the occasion on which it was used, was one in which questions of law were raised by the objections to the award.

(c) This was a rule of the court of King's Bench. It does not appear that this court or the court of Exchequer, in both of which the rule against discussing matters of law on the last day of term appears to be less strictly observed than

in the court of King's Bench, considered it advisable to promulgate a similar rule.

(d) The rule was afterwards discharged. For the argument and judgment upon the enlarged rule for setting aside the award, see *post*, *Bignall v. Gale*, which will appear amongst the cases of *Easter* term 1841, in this volume; and for the argument upon a motion to set aside a judgment which had been signed for the plaintiff, see the same case in *Hilary* term 1842.

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Jan. 27. JEPHSON and Another v. Howkins and Another.

In an action upon a bond, the condition of which was, for the honest and faithful service of a banker's clerk, three breaches were assigned, viz., — general misconduct, irregular and unbusiness-like conduct, and not faithfully accounting. An arbitrator to whom the cause was referred found specially that, on a certain day, the clerk made an erroneous balance sheet, failing to exhibit, as it should have done, a sur-

plus of 100*l.*, but that there was no proof that such sum came to the hands of the clerk ; and also that, on another occasion, the clerk having received from a customer 213*l.*, entered it in the books of the bank as 113*l.*, exhibiting on that day's balance sheet a false and unaccounted-for surplus of 100*l.* : Held, that these facts did not shew conclusively that the condition of the bond had been broken, so as to call upon the court to interfere with the inference drawn by the arbitrator.

An arbitrator to whom a cause was referred, with liberty, if he should think fit, to report specially to the court, set out in his award a long statement of the evidence, leaving the court to draw inferences of fact : Held, that this was not a due exercise by the arbitrator of the authority intrusted to him.

DEBT, upon a bond. The condition, upon oyer, appeared to be, that if *T. Howkins*, one of the defendants, should and would during all such time as he should continue and be one of the clerks for assisting and carrying on the business and affairs of a banking company, called the *Warwick and Leamington Banking Company*, well, faithfully, and honestly serve the said company in all business and transactions which he might be employed in or be requested to do and perform ; and also, when required by the board of directors of the said bank for the time being so to do, well, truly, and faithfully account for, pay over, and deliver to the public officer or public officers for the time being of the said company, or any or either of them, or to such other person or persons as the said board of directors for the time being should appoint, all and every such sum or sums of money, bills, notes, cheques, securities, books, vouchers, papers, writings, matters or things of or belonging to the said company, which should at any time be received by or come to the hands of the said *T. Howkins* by virtue of his said office, and not wilfully retain or keep back the same, then the same bond or obligation to be void, or else to remain in full force and virtue.

The defendants pleaded, that the said *T. Hawkins* did, during all such time as he continued, and was one of the clerks for assisting in carrying on the business and affairs of the said company, well, faithfully, honestly, and diligently serve the said company, &c., — averring performance of the condition according to its terms.

The plaintiffs in their replication, alleging that the said *T. Hawkins* became and was clerk to the said company for a long space of time, to wit, from the 13th of *May* 1835 to the 13th of *April* 1838, assigned for breaches: —

First, that the said *T. Hawkins* did not, nor would whilst he was such clerk, well, faithfully, honestly, and diligently serve the said company in all business which, during the time aforesaid, he was employed in and requested to do and perform; but on the contrary thereof conducted himself so ill, and in so dishonest and idle a manner, that the services of the said *T. Hawkins*, during all the time aforesaid, became and were of no use or value to the said company.

Secondly, that the said *T. Hawkins* did not, nor would during such time, nor would whilst he continued such clerk as aforesaid, well, faithfully, honestly, and diligently serve the said company in all business which, during the time aforesaid, he was employed in and requested to do and perform; but on the contrary thereof, whilst he continued, and was employed, as such clerk, he received by virtue of his said office, divers sums of money, amounting in the whole to a large sum, to wit, 40,000*l.*, and divers, to wit, 1000 bills, 1000 notes, 1000 cheques, 1000 securities, 1000 books, 1000 vouchers, 1000 papers, and 1000 writings of and belonging to the said company; and whilst such clerk, dealt with, disposed of and employed the said moneys, bills, notes, cheques, securities, books, vouchers, papers, and writings, in an irregular, improper, un-

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usual, and unbusiness-like manner, and contrary to and out of the usual course and routine of bankers and banking business.

Thirdly, that the said *T. Howkins*, after he became and was such clerk as aforesaid, although required by the board of directors so to do, did not, nor would well, truly, and faithfully account for, pay over, and deliver to the said company, all and every such sum and sums of money, bills, notes, cheques, securities, books, vouchers, papers, writings, matters, and things of and belonging to the said company, and which during the time aforesaid were received by and came to his hands by virtue of his said office; but on the contrary thereof, although he received and there came to his hands, by virtue of his office, divers sums of money, amounting in the whole to a large sum, to wit, &c., and divers, to wit, 1000 bills, &c. [the like enumeration of securities as contained in the preceding suggestion of a breach], yet he abstracted and withheld from the said company, and refused and neglected to account for, pay over, and deliver to them, the said moneys, bills, notes, cheques, securities, books, vouchers, papers, and writings.

The plaintiffs assigned two other breaches similar to the third; in the breach fourthly assigned, the refusal or neglect to account for, pay over, and deliver, being alleged to be "to the public officer or officers for the time being of the said company, or any of them;" and in the breach fifthly assigned, "to the directors or any of them."

The defendants, in their rejoinder, traversed the breaches assigned; and issue was joined thereon.

At the trial at the Summer assizes for *Warwickshire*, in 1839, a verdict was by consent taken for the plaintiffs, and the damages nominally assessed, subject to the award of a barrister, who was to be at liberty to direct for whom and for what sum the verdict should be finally

entered, the arbitrator to have all the powers that the court had, and to be at liberty, if he should think fit, to report specially to the court; the costs of the cause to abide the event of the award, and the costs of the reference, to be in the discretion of the arbitrator, who was to be at liberty to certify as to the costs of a special jury.

On the 15th of *November* 1839, the arbitrator made his award, and ordered that the verdict entered for the plaintiffs should be set aside, and a verdict entered as thereafter specially directed, according to the result of the following case, which, pursuant to the power to him given, he thereby reported to the court:—

After stating the nature of the action, and setting forth the pleadings, and that two transactions had been proved before him, both of which were alleged by the plaintiffs to be in breach of the condition of the bond, the arbitrator detailed the course of business in the bank, and proceeded:—

“ Now reference being had to the above course of business in the bank, the first transaction which I have above mentioned, was as follows:— On the 10th of *October* 1835, the cash was balanced by the said *T. Howkins*, and a statement thereof (as above described) was written by him with his own hand, shewing, with a certain sum carried on as cash in hand, a balance of the debit and credit side; and on the credit side of the said account was one item of a certain large sum remitted by the bank in the course of the day to Messrs. *Ladbroke and Co.*, bankers in *London*, part of which sum was a certain bill of exchange for 100*l.* I also find, that the said bill for 100*l.* did not form any part of the cash or bills in hand at the commencement of the day, which had been carried forward from the preceding day; and that it had been received into, and become part of the assets of, the bank on the same day on which it was remitted to *London*, in the manner hereinafter more fully

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described. I also find that *the cash of the day was not debited, as it ought to have been, with the said bill*; and therefore, if the accounts of the day had been correctly stated, and the cash, bills, and representatives of value had been properly dealt with, the debit and credit side of the cash account of the day ought not to have balanced, but a surplus unaccounted for ought to have been discovered of 100*l.* I also find, *that it was not proved that the said bill came into his, the said T. Howkins's, personal possession*, and that the entry in a book containing accounts of the gross amounts remitted to *London* on the day aforesaid, was in the handwriting of another clerk, and not of the said *T. Howkins*. And whereas I have above stated that the said bill for 100*l.* became part of the assets of the bank on the day on which it was remitted to *London* as aforesaid; by which it is to be understood, not that it was paid into the bank by a customer or other person on that day, but that, according to the course and practice of the bank, it had been previously received by the bank, and delivered into the custody of the manager, and was by him on that day transferred to the running cash, and that the cash not having been debited, a surplus of 100*l.* ought to have appeared as above mentioned, but did not; and therefore I find that *the balance sheet of the said day when the said bill was so remitted to London, was not a correct and true account of the manner in which the funds and assets of the bank had been dealt with on that day.*

And whereas the second transaction, reference being had to the course of business in the bank as above described, was as follows:—On the 16th of *January* 1836, there was a deficiency in the cash of the day amounting to 100*l.*, but there was no suppression by the said *T. Howkins* of the fact of such deficiency, nor any attempt made by him to suppress the same; and

some time afterwards, on or about the 21st of *April* 1838, the following fact occurred, which it is contended, on the part of the plaintiffs, shews that the said *T. Howkins* well knew that it was by his fraud that the deficiency of the said 100*l.* took place. On or about the 21st of *April* 1838, one *Heath* paid into his account at the bank, into the hands of the said *T. Howkins*, the sum of 213*l.*, 205*l.* thereof being a cheque, and 8*l.* in cash or bills: the said *T. Howkins* on receiving the same entered the payment correctly in *Heath's* pass-book to his credit, *but in entering the payment in the books of the bank, he credited Heath with a payment of 113*l.* instead of 213*l.**, the effect of which was, that on the cash being balanced at the close of the business, there ought to have appeared, and there did appear, to be a surplus of cash to the amount of 100*l.*; and the account, if limited to its effect on the transactions of that particular day, shewed that thereupon the bank was not subject to any loss; the account shewing that the whole amount paid by *Heath* went into the assets of the bank, though the credit was incorrectly given to the customer who paid it; but a surplus thus appearing at the time to be unaccounted for, the said *T. Howkins* represented and stated his belief, that the surplus appearing in the accounts was the result of a discovery of the error made on or about the 16th of *January* above mentioned, and that, taking the accounts of the two days together, the accounts were rectified, and that it appeared that there was in fact no deficiency, and no loss had been sustained by the bank. And I find that this state of the accounts continued until the early part of *June* following, when the true account paid by *Heath* was discovered, and it was then demonstrated that there was no surplus of 100*l.* to counterbalance the previous deficiency of 100*l.* And I further find that there was no evidence of any general misconduct of the said *T.*

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which the conclusion can be drawn that it was a wilful mistake. I must, however, protest against the court being called upon to draw inferences from a mere statement of evidence. The impression produced on the mind of an arbitrator depends greatly upon the way in which the witnesses give their testimony. Here, the arbitrator has not exercised the power intrusted to him in the way intended by the parties. It was his duty to draw the necessary inferences from the facts. This is like a special verdict on which no question of law is raised. The verdict must be entered for the defendants.

The rest of the court concurring.—

Judgment for the defendants.

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RUSSELL and Another v. BLAKE.

In an action by the payee against one of the makers of a joint and several promissory note, another of the makers, since the 3 & 4 W. 4. c. 42. s. 26., is a competent witness for the defendant to support a plea of payment.

ASSUMPSIT, against the defendant as the maker of a promissory note, bearing date the 28th of *December* 1837, for 30*l.*, payable to the plaintiffs on demand. Pleas: first, that the defendant did not make the note; secondly, that the note in the declaration mentioned was and is a certain promissory note made by the defendant, together with one *Cowen*, one *Fisher*, and one *Wilson*, whereby the defendant, *Cowen*, *Fisher*, and *Wilson*, jointly and severally, promised the plaintiffs to pay on demand to the plaintiffs, or their order, the said sum of 30*l.* That, after making the said note, and before the commencement of this suit, to wit, on &c., and on divers other days and times between that day and the commencement of this suit, the defendant, *Cowen*, *Fisher*, and *Wilson* paid to the plaintiffs, and the plaintiffs then accepted and received of and

from the defendant, *Cowen*, *Fisher*, and *Wilson*, respectively, divers sums of money, amounting in the whole to a large sum of money, to wit, 50*l.*, in full satisfaction and discharge of the said promissory note, and of all damages, causes, and rights of action in respect thereof. Verification.

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The plaintiffs joined issue on the first plea, and traversed the payment alleged in the second plea. Issue thereon.

At the trial, before the undersheriff of *Middlesex*, it appeared that the note declared on was a joint and several promissory note, given to the plaintiffs, as trustees for certain persons calling themselves the *Marylebone* Joint Stock Loan Society, by the defendant, *Cowen*, and *Fisher*, as sureties for one *Wilson*. In order to establish the second plea, the defendant proposed to call *Cowen* as a witness, to prove that he, *Cowen*, had paid the note previously to the commencement of the action.

On the part of the plaintiffs, it was objected that *Cowen* was an incompetent witness, being directly interested in the result of the suit; and *Slegg v. Phillips* (a) was cited. The undersheriff, however, on the authority of *Faith v. M'Intyre* (b), admitted his evidence; and the defendant obtained a verdict.

Wilde, Solicitor-General, in *Michaelmas* term last, moved for a new trial, on the ground that *Cowen* was an incompetent witness, inasmuch as, in the event of a verdict being found for the plaintiffs, he would have been liable to contribution; *Slegg v. Phillips*. A rule *nisi* having been granted,

Channell Serjt. now shewed cause. It may be admitted that, according to the authorities, the witness

(a) 4 *A. & E.* 852.; 6 *N.* & *M.* 360. (b) 7 *Carr. & P.* 44.

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would not have been competent previously to 3 & 4 W. 4. c. 42. s. 26. (a) It is submitted, however, that by that statute he is clearly made competent, the effect of the act being equivalent to a release. In *Wilson v. Hirst* (b) it was held, that a partner was rendered an admissible witness for his co-partners by mutual releases having been executed between them. Though mutual releases may be necessary in a case of general partnership, it is sufficient, where, as in this case, the joint contract is restricted merely to a particular instrument, and there is no common fund, if the witness has a release from the party by whom he is called. It is clear that here a release from the defendant would have made the witness competent. Undoubtedly, in *Burgess v. Cuttill* (c), which was an action by the indorsee against the acceptor of a bill of exchange, Lord Lyndhurst C. B. held, that, notwithstanding the statute, the drawer was not a competent witness for the defendant, without a release. But the contrary was decided by Parke B. in *Faith v. M'Intyre*. (d) In *Bowman v. Willis* (e), which was an action against the defendant to recover the price of a horse bequeathed to him by A.; it was held by this court, that A.'s executor and residuary legatee was a compe-

(a) Which, "in order to render the rejection of witnesses on the ground of interest less frequent," enacts, "that if any witness shall be objected to as incompetent, on the ground that the verdict or judgment in the action in which it shall be proposed to examine him, would be admissible in evidence for or against him, such witness shall nevertheless be examined; but in that case a verdict or judgment in that action in favour of the party in whose behalf he shall have been

examined, shall not be admissible in evidence for him or any one claiming under him, nor shall a verdict or judgment against the party on whose behalf he shall have been examined, be admissible in evidence against him or any one claiming under him."

(b) 4 B. & Ad. 760.; 1 Nev. & Mann. 742.

(c) 1 Moo. & R. 315.; 6 Carr. & P. 282.

(d) 7 Carr. & P. 44.

(e) 3 New Ca. 669.; 4 Scott, 387.

tent witness, since the statute, for the plaintiff, to prove that, at the time of *A.*'s decease, the horse was the plaintiff's property. So in *Yeomans v. Legh* (a), in an action on the case for negligence in driving by the defendant's servant, it was decided, that since the act the servant was a competent witness for the defendant without a release, his name being indorsed on the record. *Parke B.* there says, "The effect of the clause in the statute is to make the witness competent where the only interest is that the verdict may be used for or against the witness. In this case there is no interest, except that the verdict might be used against him in an action by his master, to shew the amount of damages recovered. I am clearly of opinion, that the effect of the act is to take away the objection to the admissibility of the witness in cases of this sort, and that its operation is not restricted to cases in which it was before impossible to make the witness competent by a release." And *Alderson B.* observes, "I have always understood the effect of the act to be, to supersede the necessity, and save the expense, of a release." In *Jones v. Pritchard* (b), which was an action for work done to a vessel, against one part-owner, it was held that another part-owner was a competent witness for the defendant after a release. In *Beckett v. Wood* (c), in an action for wages brought by the secretary of an intended joint-stock company against one of the provisional committee, another member of the committee was held a competent witness for the defendant after a release from the latter. Here, a release would have made the witness competent; and it is submitted that the effect of the statute is to render him an admissible witness, on his name being indorsed upon the record.

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(a) 2 *M. & W.* 419.

(b) 2 *M. & W.* 199.

(c) 6 *New Ca.* 380.; 8
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Wilde, Solicitor-General, in support of the rule. The decisions on this important question are very unsatisfactory, and are difficult to be reconciled. Here, it is admitted that, but for the statute, the objection to the witness would have been good; but it is contended that he is made competent by the act. The proposition, however, that the statute is equivalent to a release, cannot be supported. It will be important therefore to distinguish between the cases which turn on the effect of a release, and those which have been decided upon the operation of the statute. *Beckett v. Wood*, as well as *Wilson v. Hirst* and *Jones v. Pritchard*, the authorities therein relied upon by the court, were all cases in which a release had been given; and, consequently, have little or no bearing upon the present argument. The words of the statute are, "if any witness shall be objected to as incompetent, on the ground that the verdict or judgment in the action in which it shall be proposed to examine him, would be admissible in evidence for or against him, such witness shall nevertheless be examined." The act, therefore, expressly limits the right to examine the witness to cases where the verdict or judgment might be used for or against him on any future occasion; and it leaves all other grounds of objection wholly untouched. The cases decided on the statute are divisible into two classes: assumpsit and tort. In actions of assumpsit, questions may arise as to the liability of witnesses, wholly independent of the verdict; for, in order to charge them, it may not be necessary to resort to the judgment at all. In actions of tort, on the contrary, the liability of the witness depends upon the verdict; and, therefore, the principle of the one set of cases is not applicable to the other. In *Creevey v. Bowman*(a) *Parke B.* held, that a person under whom the defendant justified in an action of trespass, might be ren-

(a) 1 *Moo. & R.* 496.

dered a competent witness for the defendant, by indorsing her name on the record. So in *Pickles v. Hollings*(a), which was an action on the case against the defendants, as owners of a coach, for running over a filly of the plaintiff through the negligent driving of their servant, the same learned judge decided, that the servant might be called as a witness for the defendants. *Parke B.* there says, "The verdict, it is true, might be given in evidence against the witness to prove the amount of damages, in case an action be hereafter brought by the defendants against him; that is the only ground of objection that can be relied upon as making the witness incompetent; and as to that objection it may be removed, under the late statute, by making an indorsement on the record." *Yeomans v. Legh* was decided upon the same ground. A servant who does a wrongful act to a third party does not thereby become liable to his master, unless damages for such wrongful act be recovered against the latter; and an action against the servant would be founded on the damages sustained by the wrongful act, and not on the act itself. Consequently, if the liability of the witness arising out of the record be removed, he is not liable at all. [*Maule J.* You say that a witness is not admissible under the statute, if an action can be sustained against him, without resorting to the record. How could such an action be maintained? *Tindal C. J.* It is admitted on the other side, that if an action could be sustained without having recourse to the judgment, a release would be requisite.] It is not necessary for one partner to have a judgment recovered against him before he can recover contribution from his co-partner; for a payment by him of the debt is not a voluntary payment. [*Bosanquet J.* A party who pays more than his share of a debt can recover contribution from his co-contractor; but how is he

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(a) 1 Moo. & R. 468.

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liable in a suit against the latter, except upon the judgment?] He is interested in preventing a verdict passing against the defendant, which will give the latter a right of action against him. [*Maule J.* It is held, that where a man is obliged to pay a debt, but he has a remedy over against another, he has countervailing interests.] The circumstance that he has a claim over, cannot be set against an immediate liability arising on a verdict. He undoubtedly has an interest in not being called upon to pay the debt in the first instance. A co-surety may clearly enforce contribution without producing any verdict and judgment recovered against himself. Without payment these would be insufficient, and where there has been payment they are not requisite. [*Bosanquet J.* In order to make a witness incompetent on the ground of interest, some legal liability must be incurred by the event of the suit. According to your argument he is liable independently of the event of the suit.] With the exception of *Faith v. M'Intyre*, in all of the cases cited, the liability of the witness was founded on the record, and that case is opposed to *Burgess v. Cuthill*. *Slegg v. Phillips*, which was decided subsequently to *Faith v. M'Intyre*, is a distinct authority for the plaintiffs. It was there held, that one of two makers of a joint and several promissory note was not a competent witness for the other, to prove the illegality of the consideration, in an action against the latter, upon the note. *Littledale J.* there says, "If one maker of a note can prove illegality on behalf of the other, and so defeat the action, the other may also prove the illegality when the first is sued; and so the two makers may get rid of the liability altogether." So here, in like manner the parties to this note might by being witnesses for each other, get rid of their responsibility. It is true, that in *Slegg v. Phillips* no reference was made to the statute; but it cannot be supposed that it was overlooked.

TINDAL C. J. The principle involved in this case is of considerable importance, and the authorities upon the subject are conflicting; we will, therefore, take a little time for consideration.

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Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court. This was an action brought against one of the makers of a joint and several promissory note; and in order to support a plea of payment, the defendant called one of the makers of the note; and the question reserved at the trial was, whether he was an admissible witness, by virtue of the twenty-sixth section of the 3 & 4 W. 4. c. 42. The provision in that section was made, as the preamble to it states, "in order to render the rejection of witnesses on the ground of interest *less frequent*;" and for that purpose it is enacted, "that if any witness shall be objected to as incompetent, on the ground that the verdict or judgment in the action on which it shall be proposed to examine him, would be admissible in evidence, for or against him, such witness shall nevertheless be examined;" a provision being thereby made, "that the verdict or judgment in that action, in favour of the party on whose behalf he shall have been examined, shall not be admissible in evidence for him, nor shall a verdict or judgment against the party, on whose behalf he shall have been examined, be admissible in evidence against him."

The question, therefore, which has been argued before us in this case, is, whether the witness had an interest in the event of the suit, beyond that interest which was grounded on the verdict or judgment being producible in evidence, for or against him in another action.

It was admitted at the bar, that if the statute were out of the question, the witness would be incompetent; and it must be allowed that the authorities have so

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decided, whatever doubt might have been entertained as to that point, upon the ground of his standing indifferent between the parties, if the question had been *res integra*. The objection, however, urged against the witness is, that he is interested in the event of the suit, independently of any consideration of the verdict or judgment, because he would be liable to contribution in case the plaintiff should succeed in the action. But, in the first place, if such liability be not a consequence of the plaintiff's recovery, but altogether independent of it, it cannot be a liability incurred by the event of the suit. Now, if *Blake*, the present defendant, who is one of the joint makers of the note, at any time pay the amount due upon it to the holder, he may forthwith sue the witness, who is the other joint maker, for contribution, whether he (*Blake*) has been sued upon the note or not; and, again, if after he is sued, he pay before any judgment has been obtained, he may equally compel the witness to contribute; but such liability is not incurred in consequence of the event of the suit, but arises from the original relation of the defendant and the witness to each other, as joint contractors. And still further, if the plaintiff obtain judgment in this action, the debt upon the note will become a judgment debt from the defendant to the plaintiff; and if the defendant afterwards pay this judgment debt, he cannot maintain an action for contribution against the witness without resorting to the judgment, which judgment, by the provisions of the statute, cannot be given in evidence against the witness. And, although it has been argued that the defendant might in that case maintain his action against the witness for contribution, simply by producing in evidence the note, and proving the act of payment; yet such does not appear to be the case: for it would in effect be, to present to the court a cause of action which is not founded in truth and reality,

the right to contribution being in truth founded on a payment made in satisfaction of a judgment, not on the payment of a debt due upon a promissory note; and the defendant would have it in his power to defeat it, by requiring a bill of particulars of the debt on which the payment was made; and in case of payment of the note being relied upon as the foundation of the suit, by giving the judgment in evidence, which he would be entitled to do, under the terms of the statute, when the verdict had been *against* the party on whose behalf he was examined. And, indeed, with respect to the costs of the defence of the original action, (supposing that any could be demanded,) it is clear that they could not be recovered without producing the judgment itself. (a)

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(a) In *Flight v. Hammond* the plaintiff declared upon a bill of exchange for 68*l.* 15*s.*, drawn by one *Twort* upon, and accepted by, the defendant, payable at six months after date, to the order of *Twort*, and by him indorsed to the plaintiff. The defendant pleaded that the bill was accepted by him, without consideration, for the accommodation of *Twort*, and that the bill was drawn and delivered to the plaintiff upon a usurious contract, accompanied by a deposit of a lease by way of equitable mortgage (so as to bring the transaction within the exceptive proviso in the 2 & 3 *Vict. c.* 37. *s.* 1., as to the loan or forbearance of money upon security of any lands, tenements, or hereditaments, or any estate or interest therein.) The replication denied the contract. At the trial before *Cresswell J.* at *Guildhall*, 25th *January* 1842, the defendant, upon whom the proof of the issue lay, called *Twort*

to prove the contract. *Manning Serjt.* for the plaintiff objected to the admissibility of *Twort*, and cited *Jones v. Brooke*, 4 *Taunt.* 468., where, it was held that, in an action against the acceptor of a bill, accepted for the accommodation of the drawer, such drawer is not a competent witness to prove that the plaintiff became the holder of the bill on a usurious contract, because he does not stand indifferently liable to the holder and the acceptor; for the holder can recover against the drawer only the amount of the bill, whereas the acceptor is entitled to recover against the drawer, both the amount of the bill, and also all damages he may have sustained, including the costs of the action against himself.

The learned judge held that the incompetency was removed by 3 & 4 *W.4. c.* 42. *s.* 26., and admitted the witness. A note was taken of the objection; but

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Now, unless the liability incurred by the event of the suit could be enforced without resorting to the judgment, the witness is admissible under the provisions of the statute; and for the reason above given, we think that it cannot. The case of *Slegg v. Phillips* (a), which has been much relied on, turned upon the question, whether the interest of the witness was not as great or greater against, than in favour of, the party by whom he was called. The statute upon which, as we think, this case must be decided, was passed in *August* 1833, and although the trial in *Slegg v. Phillips* took place at the sittings after *Michaelmas* term, 1834, the statute was not at all referred to, either by the bar or by the court in the discussion of that case, which appears to have been treated as it would have been considered before the statute.

For these reasons we think that the objection to the witness's admissibility was removed by the statute, and that the rule for a new trial must be discharged.

Rule discharged. (b)

before the close of the trial, this point became immaterial, the defence failing on another ground.

(a) 4 *Adol. & Ellis*, 852.; 6 *Nev. & Mann*, 360.

(b) And see *Woolway v. Rowe*, 1 *Adol. & Ellis*, 114.;

3 *Nev. & Mann*, 849.; *King v. Baker*, 2 *Adol. & Ellis*, 333.; 4 *Nev. & Mann*, 228. 231.; 6 *Nev. & Mann*, 182. n.; *Phillips v. Cole*, 10 *Adol. & Ellis*, 106.; 2 *Perry & Davison*, 288.

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MORISON and Others v. SALMON.

Jan. 14.

CASE. The declaration stated, that the plaintiffs and *James Morison*, during the lifetime of the said *J. M.*, did, for a long space of time before, and at the time of the committing of the grievances thereafter mentioned, prepare, vend, and sell, and continue to prepare, vend, and sell; and the plaintiffs since the decease of the said *J. M.* still continue to prepare, vend, and sell for profit, divers large quantities of a certain medicine called *Morison's Universal Medicines*; which medicine the plaintiffs and the said *J. M.* during the lifetime of the said *J. M.* were then, and the plaintiffs since the decease of the said *J. M.* still were, used and accustomed to sell in boxes respectively thereon, that is to say: "*Morison's Universal Medicine.*" And that the plaintiffs and the said *J. M.*, during the lifetime of the said *J. M.*, before and at the time of the committing of the grievances hereinafter mentioned, had gained and acquired great fame and reputation with the public on account of the said medicine so by them prepared, vended, and sold, and continued to be prepared, vended, and sold as aforesaid; whereby the plaintiffs and the said *J. M.*, during the lifetime of the said *J. M.*, daily prepared medicines in imitation of the medicines so prepared by the plaintiffs, and wrapped up the same in paper, with the words "*Morison's Universal Medicine*" printed thereon, in order to denote that such medicine was the genuine medicine prepared and sold by the plaintiffs; and that the defendant, deceitfully and fraudulently, vended and sold, for his own lucre and gain, the last-mentioned boxes of the said articles, represented by him to be medicines by the name and description of "*Morison's Universal Medicine,*" which had been prepared and sold by the plaintiffs; whereas, in truth, the plaintiffs had not been the preparers, &c. thereof.

The declaration, after stating that the plaintiffs prepared, vended, and sold, for profit, a certain medicine called "*Morison's Universal Medicine,*" which they were accustomed to sell in boxes wrapped up in paper, which had those words printed thereon, alleged that the defendant, intending to injure the plaintiffs in the sale of their said medicines, deceitfully and fraudulently

Held, on a motion to arrest the judgment, that the declaration disclosed a sufficient cause of action.

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acquired and obtained great gain and profit to the great increase of their riches. Yet the defendant well knowing the premises, but wickedly and wrongfully, subtly and unjustly, intending to injure the plaintiffs and the said *J. M.* during his lifetime in their said sale of the said medicine, and to deprive them of the great gain and profits which they would otherwise have acquired, by preparing, vending, and selling the said medicine as aforesaid, to wit, on the 1st of *May*, 1889, and on divers other days and times, between that day, and the day of the commencement of this suit, did wrongfully, knowingly, injuriously, deceitfully, and fraudulently, against the will, and without the licence or consent of the plaintiffs and the said *J. M.*, prepare and make, and cause to be prepared and made, divers, to wit, 10,000 boxes of certain articles, represented and termed by him to be medicines in imitation of the said medicines so prepared, vended, and sold by the plaintiffs and the said *J. M.* as aforesaid, and did wrap and cause to be wrapped the said boxes of medicine so prepared and made by the defendant, in paper having the following, amongst other words, printed thereon: that is to say, “*Morison’s Universal Medicines*,” in order to denote that such medicine was the genuine medicine prepared, vended, and sold by the plaintiffs and the said *J. M.*, and on the several days and times aforesaid, did knowingly, wrongfully, injuriously, deceitfully and fraudulently vend and sell for his own lucre and gain, the said last-mentioned boxes of the said articles represented and termed by him to be medicine by the name and description of “*Morison’s Universal Medicines*,” which had been prepared, vended, and sold by the plaintiffs and the said *J. M.*; whereas in truth and in fact, the plaintiffs and the said *J. M.* had never been the preparers, venders, or sellers thereof, or of any part thereof; by reason of which premises, the plaintiffs and

the said *J. M.* were fraudulently, deceitfully, wrongfully, and injuriously hindered and prevented by the defendant from selling, vending, and disposing of divers large quantities, to wit, 10,000 boxes of the said medicine, which they the plaintiffs and the said *J. M.* would otherwise have sold, vended, and disposed of; and the plaintiffs and the said *J. M.* were also deprived of divers great gains and profits which would otherwise have accrued to them from the sale thereof, and were otherwise greatly injured in the selling and vending of their said medicine.

Plea, not guilty; whereon issue was joined.

At the trial before *Maule J.*, at the sittings in *London*, after *Michaelmas* term, it appeared that the defendant had formerly been an agent of the plaintiffs in selling their medicines. It was proved by one of the witnesses for the plaintiffs, who had been in the habit of buying *Morison's* pills at the defendant's shop, that on asking for that article, he sold her two boxes of medicine prepared by himself, wrapped up in paper marked "*Morison's Universal Medicine.*"

The learned judge left it to the jury to say, whether the defendant had sold an article made by himself, with a representation that it was the article prepared and vended by the plaintiffs; adding, that if the defendant used such marks as would deceive a person paying ordinary attention, so as to lead him to suppose that the medicines sold were the plaintiffs', the latter were entitled to recover.

The jury having found for the plaintiffs, — damages, one farthing, — the learned judge certified, under the 3 & 4 *Vict. c. 24.*, in order to entitle the plaintiffs to costs.

Talfourd Serjt. now moved for a new trial, on the ground that the verdict was not warranted by the evidence, or to arrest the judgment. On the latter point,

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he submitted that the declaration did not disclose a sufficient cause of action. There being no patent, the defendant had an undoubted right to manufacture and sell the articles which are the subject of complaint. Although an action will lie against a party who adopts the mark of another for the purpose of denoting that his goods are manufactured by the latter, and who sells the goods so marked as goods manufactured by the latter; *Sykes v. Sykes* (a); yet, here, the declaration does not contain a distinct allegation, that the defendant represented that the article sold by him, was manufactured by the plaintiffs; but that he represented it to be medicine in imitation of the medicine prepared by the plaintiffs. Neither is it averred that any person was deceived by his representation.

In *Singleton v. Bolton* (b) the father of the plaintiff had, in his lifetime, prepared and sold an article, called "Dr. S.'s Yellow Ointment," for which he had no patent; after his death, the plaintiff continued to sell the same article, and the defendant sold a medicine under the same name and mark; it was held that no action could be maintained by the plaintiff against the latter.

TINDAL C. J. It appears to me that this declaration discloses a sufficient ground of action. It commences by stating that the plaintiffs prepared, vended, and sold for profit a certain medicine called "*Morison's Universal Medicines*," which they were accustomed to sell in boxes wrapped up in paper with those words printed thereon; and that the defendant, intending to injure the plaintiffs in the sale of the said medicines, and to deprive them of their profits, deceitfully and fraudulently prepared and made medicines in imitation of the me-

(a) 3 B. & C. 541., 5 D. &
 R. 292.

(b) 2 Dougl. 293. / 3 / .

dicine so prepared and made by the plaintiffs. As there is no patent for the article in question, if the allegation had stopped there, it would not have disclosed a good cause of action; but it goes on to aver that the defendant wrapped up his medicines in a paper having "*Morison's Universal Medicines*" printed thereon, in order to denote that such medicines were the genuine medicines prepared, vended, and sold by the plaintiffs. The declaration alleges further, that the defendant deceitfully and fraudulently vended and sold for his own lucre and gain the said last-mentioned boxes of the said articles, represented by him to be medicine, by the name and description of "*Morison's Universal Medicines*," which had been prepared, vended, and sold by the plaintiffs; whereas in truth the plaintiffs had never been the preparers, &c., thereof. This seems to me to be a sufficient allegation of a false representation by the defendant, that the medicine sold by him had been prepared by the plaintiffs. I also think that the verdict was warranted by the evidence.

BOSANQUET J. I also am of opinion that this declaration discloses a sufficient cause of action; for it sufficiently appears, not only that the defendant prepared medicines in imitation of those of the plaintiffs, but, that having so prepared them, he sold them as and for the medicines prepared by the plaintiffs.

ERSKINE J. I am of the same opinion. The ground of action is, not that the defendant prepared and sold medicine in imitation of "*Morison's Universal Medicine*," but that he prepared and sold it under a false representation that it was the article prepared and sold by the plaintiffs, whereby the plaintiffs were prevented from selling large quantities of their medicine. That is

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MAULE J. I also think that this record discloses a good cause of action. Although the declaration is somewhat involved, it sufficiently alleges a false representation by the defendant, that the article prepared and sold by him under the name of "*Morison's Universal Medicines*," was medicine prepared by the plaintiffs, and that allegation was clearly established by the evidence.

Rule refused. (a)

Jan. 30.

The master having taxed the plaintiffs their full costs —

Whatever may be the issue raised on the record, if a case can be suggested in which a right, beyond the mere right to recover damages, *might* come in question at the trial, the judge has power to certify under the 3 & 4 Vict. c. 24., so as to give the plaintiff costs.

Talfourd Serjt. on a subsequent day in the term, obtained a rule, calling upon the plaintiffs to shew cause, why the master should not review his taxation, on the ground, that the learned judge had no power to certify at the trial under the 3 & 4 Vict. c. 24., inasmuch as no right came or could come in question upon the record.

Storks and *Bompas* Serjts. now shewed cause. The object of the statute was to discourage frivolous suits; and for that purpose the judge at the trial is invested with large discretionary powers, with which the court will not interfere, unless it clearly appears that the case is not within the act. *Shuttleworth v. Cocker* (b) is deci-

Where, in case against the defendant for selling medicine under a false representation that it was prepared by the plaintiffs, the jury returned a verdict for the plaintiffs, damages one farthing, and the judge certified under the 3 & 4 Vict. c. 24. :

Held, that the case was within the act.

(a) *Quære*, whether the rule, *ex turpi causâ non oritur actio*, would have been applicable to this case.

(b) *Antè*, Vol. I. 829. ; and see *Marriott v. Stanley*, *Ibid.* 853.

sive of the present case. *Maule J.* there observes, "It is said that the right could not come in question on this record; but even supposing that were so, yet the action may still have been *brought* to try a right, although the defendant afterwards did not think proper to contest such right. An action may be brought to try a right, where nothing appears on the record to indicate such an intention." The statute applies wherever a right, besides the mere right to recover damages, may come in question. Here, it is clear, that the action was not brought to recover damages, but to contest the right of the defendant to injure the plaintiffs by selling an imitation of their medicine as the genuine article. Upon the record as framed, there can be no doubt that a right *might* have come in question; and in point of fact the defendant contended at the trial, that he had a *right* to do that of which the plaintiffs complained.

Talfourd Serjt. in support of the rule. It may be conceded, that if the case is within the statute, the court will not interfere with the discretion exercised by the judge at the trial; and also, that the issue raised on the record is not alone to be regarded. The real question is, whether the action was or could be brought for the purpose of trying a right beyond the mere right to recover damages. The point is of great importance, as the statute vests a discretion, not only in a judge at nisi prius, but also in undersheriffs on writs of trial, or writs of inquiry. [*Maule J.* Writs of trial are not sent to be tried before the sheriff, if there is reason to think that any difficult point will arise.] If the question is to depend on what occurs at the trial, a judge cannot foresee what may take place. If this action is held to be within the statute, it is difficult to conceive a case in which a question of right may not arise. [*Maule J.* That is the difficulty. It is clear that there is no case

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of trespass or of trespass on the case in which a certificate may not be grantable.] This action was not brought to try a right, but to try whether or not the defendant had been guilty of a wrong; and it is not to be distinguished from an action for slandering a man in the way of his trade. The wrong charged did not consist in manufacturing the medicine, but in labelling it so as to represent it to be the plaintiffs', whereby the latter were prevented from selling so much as they otherwise would, of their own article. What is that but complaining of a personal wrong? A party has a right to walk along the street, but if he be assaulted it cannot be said that the right to walk the street can come in question. *Shuttleworth v. Cocker* is distinguishable from this case. That was an action for a nuisance, the complaint being as to the mode in which the defendant occupied his premises. There, a question might have arisen, whether the acts alleged to be a nuisance had not been legalised by lapse of time. [*Maule J.* In this case could not the defendant have set up as a defence that he had a right to sell the medicines which he sold?] No patent could authorise him to do an act which in its nature is fraudulent and deceitful.

TINDAL C. J. I am of opinion that this rule should be discharged. It has been very properly conceded, in the course of the argument, that we have no right to investigate the facts which were given in evidence at the trial. All that we have to do is, to inquire whether the case falls within the scope and object of the act; for if any case can be put which would bring it within the statute, that is sufficient. The words of the act are, [here the Lord Chief Justice read the clause. (a)] What, therefore, the judge is called upon to do is, to consider the object and design of the plaintiff in in-

(a) See the clause *antè*, Vol. I. p. 834.

stituting the action ; and if he is satisfied that the plaintiff conceived he had a right which might come in issue, the judge has a discretion vested in him to grant a certificate. Now, how can we say that a right might not possibly come in question in this action ? Many modes might be pointed out in which it might. The action is brought against the defendant for selling medicines prepared by himself under the same name and marks as those sold by the plaintiffs, so as to induce the world to believe that they were medicines made by the plaintiff. How could the plaintiffs, when they commenced their action, foresee that the defendant would not set up a right to do so ? He might have set up a license, or that he had purchased the right from the original proprietor. Many cases may be conceived in which the plaintiffs might think that they were bringing the action to try a right. If any case may be suggested in which the judge might exercise his discretion under the statute, we have no power to interfere ; and I think that this rule, which has been obtained in order to induce us to review our former decisions, must be discharged.

BOSANQUET J. I also am of opinion that this certificate was properly granted by the learned judge at the trial. The action may have been brought by the plaintiffs, either to try their right to sell medicines prepared by themselves, and stamped with a peculiar label, without being subjected to a fraudulent imitation of the articles so sold, on the part of the defendant ; or it may have been instituted, to try the right of the latter to sell medicines in boxes marked and stamped like those of the plaintiffs ; and in either of these cases a right would come in question. The case of *Shuttleworth v. Cocker* approaches very closely to the present. An action for a nuisance may be brought either to recover damages for

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an injury to an acknowledged right, or to try whether the defendant had a right to do the act of which the plaintiff complains. It appears to me that this is a case, in which a right of the plaintiffs or of the defendant, might have come in question, and that the object of the plaintiffs in instituting the action may have been to try, either the right of the one or of the other.

ERSKINE J. Looking at the record, we cannot say that the action may not have been brought to try the right of the defendant to sell the medicine. Whether or not it was so brought, was a question for the judge who tried the case; and we cannot inquire whether he exercised a sound discretion in granting the certificate.

MAULE J. It appeared to me at the trial that the action *was* really brought to try a right. It, therefore, followed, as a fair inference, that a right *might* have come in question. The right is of a well known description. It is not a general right to carry on a particular trade, but a right to protection which a party has who uses certain marks, and to the use of which he may have as good a right as though he were a patentee. Applications are frequently made to the court of Chancery to enjoin one manufacturer from imitating the mark of another; and in such cases that court, before it grants relief, occasionally requires the party first to establish his right at law. (a) It may have been that this very action was brought under those circumstances. I think that upon this record, that is to say, upon the declaration, a right could come in question; but, even if that were not so, I am far from thinking that the judge would not have power to certify. Suppose a case can be put of a declaration in trespass or case (although I do not think it can) in which a right could not by

(a) Vide *Crawshay v. Thompson*, *Michaelmas term, post*.

possibility come in question, still if it should appear to the judge that the plaintiff had really *intended* to try a right, I conceive that the former would have power to certify. If an action be really brought to try a right, whether it is calculated for that purpose or not, the party is within the letter, and, as it seems to me, also within the spirit of the act.

Rule discharged, with costs.

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Jan. 21.

ASSUMPSIT. The declaration stated, that on the 20th of *October*, 1837, the defendant bargained for, and bought of the plaintiffs, and the plaintiffs then sold to the defendant, ten tons of merchantable linseed oil, at the rate and price of 31s. 6d. per cwt., with usual allowances, to be free delivered by the plaintiffs to the defendant *within the last fourteen days of March*, 1838, and paid for, at the expiration of that time, in cash, deducting 2½ per cent. discount. Mutual promises. Breach: that although the plaintiffs afterwards, and within the last fourteen days of *March*, 1838, to wit, on the 31st day of *March*, 1838, were ready and willing, and then tendered and offered, to deliver to the defendant the said ten tons of merchantable linseed oil, and then requested the defendant to accept the same, and although the price for the said linseed oil, at the rate aforesaid, amounted to a large sum of money, to wit, 315*l.*, and although the said time for payment for the said linseed oil has long elapsed, yet the defendant did not, nor would, when he was so requested as aforesaid, or at any time before or afterwards, accept the said linseed oil or any part thereof, of or from the plaintiffs, and has not, although often requested so to do, paid

Where, upon a sale of merchandise, it was stipulated that the delivery should be within the last fourteen days of *March*, the delivery stipulated for was construed by the court. — *hæsitante Erskine J.*, — to be a delivery within the ordinary hours of business.

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Pleas: first, that the said tender of, and offer to deliver, the said linseed oil, and the request to accept the same, were made on the last of the said fourteen days, at a late time of that day, to wit, at nine o'clock in the night time, the same being, by reason of such lateness thereof, an unreasonable and improper time in that behalf for the said tender and delivery of the said oil; and that the plaintiffs were not, until a late, and for the delivery and acceptance of the said oil, an unreasonable and improper time of the day, to wit, at the hour aforesaid, ready or willing to deliver the said linseed oil to the defendant, *modo et formâ*. Verification. To this plea the plaintiffs replied *de injuriâ* (a); upon which issue was joined.

The defendant, in a second plea, traversed the tender, and, in a third, pleaded non assumpsit; upon both of which pleas issue was joined.

July 3. At the trial, before *Erskine* J., at the sittings at Guildhall, after *Trinity* term, 1839, the following sold note was produced and proved by the plaintiffs: —

“*London, 20th October 1837.*

“Sold for Messrs. *Startup* and *Philpott*, to Mr. *A. Macdonald*, ten tuns merchantable linseed oil; at 31s. 6d. per cwt.: usual allowances: to be free delivered within the last fourteen days of *March* 1838, and paid for at the expiration of that time in cash, deducting 2½ per cent. discount.

“*James Nicholl*, Broker,

“*No. 3. Adam's Court.*”

(a) As to this replication in assumpsit, *vide antè*, Vol. I. p. 720.

The plaintiffs further shewed that ten tons of merchantable linseed oil sent by them from their crushing mills near *Maidstone*, arrived at a wharf in *London* at six o'clock in the evening of *Saturday* the 31st of *March*, and that at half-past six notice was given at the defendant's warehouse that the oil was on its way. The ten tons were put into two waggons, the first of which reached the defendant's warehouse at half-past eight, when the warehouseman refused to receive the oil, alleging, as the fact was, that the workmen were gone and the warehouse closed, for the night. This waggon returned to the wharf, as did also the second, which met the first on its way back. The oil was tendered again on *Monday* the 2d of *April*, when the defendant refused to receive it; and it was resold at a loss of 50%. On the part of the defendant, it was shewn that oil warehouses usually close at five, six, or seven o'clock, and that none are kept open so late as half-past eight. It appeared also, that according to the usage of the trade, the oil was, upon such a contract, to be delivered, free of expense, at a place to be indicated by the buyer.

For the defendant it was contended, that the plaintiffs were bound to deliver the oil upon one of the fourteen days mentioned in the sold note, at a reasonable time of the day, reference being had to the usage of the trade at the place of delivery. It was answered that, according to the legal construction of the contract, the plaintiffs had the whole of the last day for the delivery of the oil, and that a tender at any time before twelve at night, or, at least, a tender made on that day, early enough for the delivery to be completed before midnight, was sufficient; and *Leigh v. Paterson* (a) was cited. The learned judge told the jury that, in his opinion, a tender made so that the whole of the oil might have been warehoused before twelve at night, would be sufficient to enable the plaintiffs

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(a) 8 Taunt. 540.; 2 B. Moore, 588.; post, 399.

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to maintain their action. The jury, however, returned a verdict for the defendant; adding that they found, that the oil would have been delivered before twelve at night if the warehousekeeper had not refused to take it in; but that the tender had been made at an unreasonable hour. Upon this finding the learned judge directed, that a verdict should be entered for the plaintiffs, with 50*l.* damages, with leave to move to enter a verdict for the defendant in case the court should be of opinion, that the construction put by his lordship upon the contract, was erroneous.

In the following term *Kelly* obtained a rule nisi to enter a verdict for the defendant upon the first issue (*a*), without prejudice to any application to be made, at the time of showing cause by the plaintiffs, for the judgment to be entered for them *non obstante veredicto* on the first issue, — or for a new trial.

Cleasby now shewed cause. The first part of this rule cannot be supported, unless a direction by the learned judge to the jury to find their verdict upon this evidence for the plaintiffs would have amounted to a misdirection. There is nothing on the face of the first plea to shew that the effect of the contract was, to limit the plaintiffs to any particular part of the day. The issue is simply, — whether there was a sufficient tender to satisfy the contract, as that contract is set forth in the declaration. The words unreasonable and improper, used in the plea, are to be construed with reference to the general rule of law, not to any particular local custom. [*Tindal* C. J. The plaintiffs have not demurred to the plea on the ground that it could not properly be pleaded to a declaration upon a contract which gave the plaintiffs the whole of the day in which to make the delivery.] No question as to any usage of trade is raised by the plea,

(*a*) Meaning, issue upon replication to *first plea*.

the terms of which must be understood in a sense in which they are applicable to the contract stated in the declaration, and not as introductory of other matters. [*Tindal* C. J. According to your construction of the contract the plaintiff might deliver one ton every night; surely the question whether the time of the tender was reasonable must depend upon the usage of the trade, and the circumstances of the particular case. A warehouse-keeper is not bound to keep his doors open, and be in attendance, throughout the whole of the night.] The plea amounts to nothing more than a special traverse of the tender stated in the declaration. In *Scheibel v. Fairbain* (a), it was said by *Rooke* J., that "reasonable time" is a question of law, not of fact. (b) Unless the plaintiffs are liable to be sued by the defendant for not delivering the linseed oil within the fourteen days, they are entitled to recover in this action. [*Tindal* C. J. Suppose the defendant had simply taken issue upon the allegation of the tender, would the affirmative have been sustained by evidence of a tender made at a time which the jury found to be unreasonable and improper?] The second plea raises that precise question; and the issue upon that plea is found for the plaintiffs. [*Erskine* J. The main point is, whether the delivery might be at any time before twelve o'clock, or whether it ought to have been before the time at which the warehouse closes. In *Leigh v. Patterson* (c), the contract was for

(a) 1 *B. & P.* 388.

(b) For this were cited "13 *Co.* 3., *Bract.* lib. 2. fo. 51., *Cro. Car.* 14." In 13 *Co. Rep.* 3., Lord *Coke* is speaking of the reasonableness of the amount of a *fine*. In the margin it stands "*Bracton*, l. 2. fo. 51. *Quam longum debet esse tempus non definitur in jure, sed pendet ex justiciariorum discretione.*" But the passage in *Bracton*, as observed

in 1 *B. & P.* 389. n., relates only to the length of possession necessary to confer a title; "*sed quam longa (possessio) esse debeat non definitur a jure, sed ex justiciarorum discretione,*" *Cro. Car.* 14. relates only to convenient time for bringing a prisoner into court, and taking him back to prison. And see *Com. Dig. Temps.* D, E, F.

(c) 8 *Taunt.* 540.; and see *S. C.* 2 *B. Moore*, 588.

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the sale of a certain quantity of tallow, to be delivered *in all December*, at 65s. per cwt. In that case *Dallas C. J.*, in delivering judgment, says, “the defendant had a right to deliver the tallow at any time *before twelve at night* on the 31st of *December*; he had all that month to deliver it in, and the plaintiff was bound to receive the tallow *at any moment* until after the 31st.” The plaintiffs may have rendered themselves liable to an action for not delivering at a reasonable time; but that is *dehors* the contract. (a) [*Tindal C. J.* Suppose there was a contract to deliver *on demand*, would it be sufficient to knock at the door of the seller’s warehouse in the middle of the night?] That might be a good demand, if capable of being complied with on the part of the seller. The rule contended for on the other side, makes the liability to perform the contract depend upon the act of the purchaser only, in directing at what place the delivery shall be made. Here the contract would have been performed, if the defendant had named any place near the wharf for the delivery of the oil, instead of selecting a distant warehouse. [*Maule J.* The purchaser would be bound to name a reasonable place of delivery.] The facts in this case were undisputed. There was nothing but the contract for the consideration of the learned judge.

Kelly, in support of the rule. The plea is good; and it was supported by the evidence at the trial. If, as contended on behalf of the plaintiffs, a tender of the oil at any time before twelve o’clock at night on the 31st of *March* would have been sufficient, it necessarily follows that the plaintiffs might have sent the oil upon any

(a) There would in that case appear to be two simultaneous contracts as to the delivery of the oil, one, express, to deliver at some time before the termination of the fourteen days; another, implied, to deliver at a reasonable hour.

of the fourteen days at one o'clock in the morning. Every merchant, then, must keep persons at his warehouse with lights during the whole night. [*Maule J.* The purchaser might stipulate that the delivery should be made within reasonable hours.] Such a stipulation would be unusual. If the plaintiffs had the whole of the fourteen days, were the hour reasonable or unreasonable, why might they not deliver goods on a *Sunday*? [*Maule J.* That would be the exercise of a worldly calling on the Lord's day. My doubt is, whether the plaintiffs should not have stated in their declaration that the oil was to be delivered at a reasonable time (a). If the declaration is to be so construed, and the plea is understood in the same sense, the defendant would be entitled to a verdict.] The defendant having proved the allegations of his plea in their ordinary sense, he is entitled to a verdict upon the issue taken upon those allegations, whether they constitute an answer to the action or not. Thus in *Lumby v. Allday* (b) it was held, that where the facts, stated in the declaration as the cause of action, are proved, it is no ground for nonsuiting the plaintiff, that those facts do not constitute a sufficient cause of action. The oil was sold at 31s. 6d. per cwt.; and how was the defendant to weigh the oil after his servants had gone home for the night. The question here is, not whether a tender was dispensed with, but whether, under all the circumstances, any legal tender was made, so as to meet the allegation in the declaration, that the oil was tendered (c).

TINDAL C. J. It appears to me that the sale-note must have a reasonable construction, and that a count

(a) In this view of the case the omission of the qualification would appear to entitle the defendant to a verdict, upon the plea of non assumpsit.

(b) 1 *Cro. & Jerv.* 301.,
1 *Tyrwh.* 217.

(c) That question would arise upon the second plea rather than upon the first.

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founded upon that sale-note must have as reasonable a construction as the contract itself. I am of opinion, that in a contract for the sale of oil, the words "to be free delivered within fourteen days," import a delivery at a reasonable time, and in a reasonable manner. If the position of the parties had been reversed, and a demand had been made upon the vendors to deliver the oil at an unreasonable place, that would have amounted to no demand at all. Any person, although not a merchant, on looking at the contract or at this declaration, would know that it was not contemplated by the parties that the oil should be delivered in the dead of the night. It appears to me, that, by engrafting this term upon the contract, we are not offering greater violence to the written agreement between the parties than was done by Lord *Ellenborough* in *Greaves v. Ashlin (a)*. Though that case does not go the whole length of supporting our present decision, it is nearly allied to it in principle. I am therefore of opinion, that the special plea is made out, and that it is in terms applicable to the declaration, and that the rule for entering a verdict for the defendant should be made absolute.

BOSANQUET J. I am of the same opinion. A mercantile contract is to receive a reasonable construction. The delivery was to be made "within the last fourteen

(a) 3 *Campb.* 426. That was an action for not delivering oats, bought by the plaintiff under the following sale-note: —

"Sold to *John Greaves* 50 quarters of oats, at 45s. 6d. per quarter, out of 175 quarters.

"*J. Stevenson* for
 "*J. Ashlin.*"

But even in that case it appears that Lord *Ellenborough* refused

to receive evidence, tendered by the defendant, that, by the usage of the trade, where goods are sold to be delivered at a distant day, the time is always mentioned in the contract, on the ground that it was not competent to the parties to vary the written contract by parol evidence; and his lordship cited *Meres v. Ansell*, 3 *Wils.* 275.

days of *March*," in a reasonable manner, according to the nature of the article which forms the subject matter of the contract. It would be unreasonable to tender and deliver this oil at a late hour in the night. I think that the true meaning of the contract, as it is stated in the declaration, is that the delivery is to be made in a reasonable manner, and that the same sense is to be affixed to the terms of the special plea. That plea states, that the tender and offer to deliver were made on the 31st day of *March*, at a late hour of that day, to wit, at nine o'clock in the night time, the same being, by reason of the lateness thereof, an unreasonable and improper time for the tender and delivery of the said oil. The jury have found that there would have been sufficient time to warehouse the oil before twelve o'clock; but they also found, that nine o'clock at night was an unreasonable and improper hour to deliver the oil.

MAULE J. • I also am of opinion, that the verdict on the issue taken on the special plea, must be entered for the defendant. I think the question turns entirely upon the meaning of the language of the declaration. The defendant says, by his plea, that the tender was made at an unreasonable time. That means, an unreasonable time for performing the contract *declared on*. If the declaration means that the oil might be delivered at any time within the fourteen days, whether the time was proper or reasonable for delivering oil at a warehouse or not, then the plea must be understood as alleging that the tender was made at an improper and inconvenient time for effecting a delivery before twelve o'clock at night; and, if so, the plea is disproved. If, on the other hand, the meaning of the *declaration* is, that the oil should be delivered at a reasonable time, then the plea is proved. I do not think that it can be noticed that this is a contract between *merchants*; but I

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1841. think, that when a contract set out on the record is
 ——— silent as to the time at which it is to be performed, the
 STARTUP court must consider that a reasonable time is intended,
 v. as in the case of other instruments. If the tender were
 MACDONALD. made at an unreasonable place, could not the purchaser
 refuse to receive the goods there? (a) The sale-note does
 not express that the oil is to be delivered *in casks*; but,
 would the purchaser be bound to receive it if offered to
 be delivered *in bulk*? Whatever is the proper sense of
 the terms as they occur in the declaration, they are to
 be understood in the same sense when used in the plea.

ERSKINE J. I entirely concur with the rest of the
 court, not only in thinking that this contract must re-
 ceive a reasonable construction, but also in thinking
 that it could be satisfied only by a delivery within
 reasonable hours. *Leigh v. Patterson* was cited at the
 trial, to shew that the vendor had till twelve o'clock
 at night on the last day to make the delivery. That
 case appeared to me to distinguish the last day from
 any intermediate day, because inasmuch as the de-
 fendant had named a place for the delivery, he must
 be taken to have named a place at which the oil could
 be delivered down to the last moment. But I am now
 of opinion, that the rule laid down by the rest of the
 court is the more *convenient* one; and I concur with
 them in thinking that the verdict upon the special plea
 should be entered for the defendant.

Rule absolute accordingly (b).

(a) Here, the place of de-
 livery was to be appointed by
 the purchaser: *vide ante*, 397.

(b) The verdict being for the
 plaintiffs upon the pleas con-
 cluding to the country, they
 brought error upon the judgment
 for the defendant, on the ver-

dict upon the special plea, upon
 the ground of its alleged insuffi-
 ciency; thus substituting a writ
 of error for a motion for judg-
 ment *non obstante veredicto*.
 And see *Plowd.* 172.; *Co. Litt.*
 211 a.; *Shepp. Touchst.* 136.
 378.

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THOMAS HARRIS v. LETTIA GOODWYN, Administratrix, with the will annexed, of CHARLES SAMUEL GOODWYN, deceased.

Jan. 16.

COVENANT. The declaration stated that 8th April 1826, by indenture between *William Newton* and the plaintiff, *Newton* demised to the plaintiff a piece of garden ground and a messuage and buildings, *habendum* from 25th of March preceding, for twenty-one years, at the rent of 50*l.* per annum, payable quarterly, with the usual covenants to pay the rent and keep the demised premises in repair; that the plaintiff entered and became possessed; that on the 10th of August 1826, by indenture between the plaintiff and *C. S. Goodwyn* the intestate, the plaintiff assigned the term to *C. S. Goodwyn*, subject to the payment of the rent and performance of the covenants of the lease, with a covenant that *C. S. Goodwyn*, his executors, &c., would pay the rent and keep the covenants of the lease. Breach: first, by non-payment of the rent in the lifetime, and after the death, of *C. S. Goodwyn*, whereby the plaintiff was obliged to pay the same; secondly, by non-repair, before and since the death of *C. S. Goodwyn*; thirdly, by voluntary waste committed by *C. S. Goodwyn*, and by the defendant as administratrix.

Pleas: first, that the demised premises, on the death of *C. S. Goodwyn*, were, and thence hitherto have been, and are, of less value than the value of the rent of 50*l.*,

In covenant by *A.* against *B.* as administratrix of *C.*, for breaches of covenant in an indenture between *A.* and *C.*, *B.* pleads that she took out administration at the request of *A.*, and upon his promise that he would not charge or seek to charge her as administratrix or otherwise, with any breaches of the covenants contained in the indenture, and that no assets have come to her hands since the taking out of administration.

The plaintiff having replied, taking issue upon the promise: Held, that the affirmative of the issue was supported by a verbal promise, and that the court would not, after verdict for the defendant, assume that a promise under seal had been proved: Held, also, that the plaintiff was entitled to judgment *non obstante veredicto*, on the ground of the insufficiency of such parol promise to bar the action.

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that is to say, of no value whatever; and that the defendant never entered upon, or took possession of, the premises, or any part thereof, or at any time had or received any profit, benefit, or advantage from the premises, or any part thereof, and that she has fully administered all and singular the goods and chattels which were of *C. S. Goodwyn* at the time of his death, which have ever come to, or been in, the hands of the defendant as administratrix as aforesaid, to be administered, and that she has not, nor had she at any time since the death of the said *C. S. Goodwyn*, or at the time of the commencement of this suit, or at any time since hitherto, any goods or chattels which were of the said *C. S. Goodwyn* at the time of his death, in her hands as administratrix to be administered, applicable to or towards, or chargeable with, the payment, satisfaction, or discharge of, or wherewith she could or ought to satisfy or discharge, the rent in the declaration mentioned, or any part thereof, or to make satisfaction for the breaches of covenant in the declaration mentioned, or any of them, or any part thereof. Verification.

Secondly, that the said *C. S. Goodwyn* died in a state of absolute insolvency, but left a will, to wit, the will in the declaration mentioned, but did not nominate or appoint any executor or executors of his will, and that she, the defendant, being the widow of the said *C. S. Goodwyn*, did, by reason and in consequence of such insolvency of the said *C. S. Goodwyn*, decline and refuse, until the time thereafter mentioned, to apply for, or take out, administration of the goods, chattels, and credits which were of the said *C. S. Goodwyn* at the time of his death, with the last will and testament of the said *C. S. Goodwyn* annexed, or otherwise; of all which premises the plaintiff had notice; that after such refusal of the defendant, and after the plaintiff had notice thereof, and that the said *C. S. Goodwyn* had so died

in insolvent circumstances, and that the defendant, by reason and in consequence thereof, had declined and refused to take out such administration as aforesaid, and before the commencement of this suit, to wit, on the 11th of *June* 1838, the plaintiff applied to the defendant, and requested her to apply for, and take out, administration of the goods, chattels, and credits which were of the said *C. S. Goodwyn* deceased, at the time of his death, with the said will of the said *C. S. Goodwyn* annexed, for the purpose of enabling, and to enable, her to make a formal and legal reassignment of the premises in the declaration mentioned, with the appurtenances, and of the said indenture of the 8th of *April* 1826, to him the plaintiff, but not for the purpose of charging her as administratrix of the goods, chattels, and credits which were of the said *C. S. Goodwyn* deceased at the time of his death, with the will of the said *C. S. Goodwyn* annexed, or otherwise, with any breaches of the covenants contained therein, or in the said indenture of the 10th of *August* 1826; that the defendant, at such request of the plaintiff, and on the express understanding between the plaintiff and her, and on the express promise and undertaking of the plaintiff, that if she applied for and took out administration, &c., of the goods, chattels, and credits which were of the said *C. S. Goodwyn* at the time of his death, with the will of the said *C. S. Goodwyn* annexed, he, the plaintiff, would not charge, or seek to charge, her, as such administratrix, or otherwise, with any of the breaches of the covenants contained in the said indenture of the 8th of *April* 1826, or the said indenture of the 10th of *August* 1826; that the defendant, on the faith of such understanding, undertaking, and promise, and for such purpose as aforesaid, and for no other purpose whatsoever, and not having, nor having had, in her hands, power, custody, or possession any goods or chattels which were of the

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said *C. S. Goodwyn* at the time of his death, then consented to apply for and take out, and afterwards, to wit, on the 18th of *July* 1838, did apply for and take out administration of, and to, all and singular the goods &c. which were of the said *C. S. Goodwyn* deceased at the time of his death, with the will of the said *C. S. Goodwyn* annexed, and being the administration in the declaration mentioned, and that she had always since she so became administratrix as aforesaid, at the request of the plaintiff as aforesaid, and for the purposes aforesaid, been and still was ready and willing to execute a formal and legal and proper reassignment of the premises in the declaration mentioned, and of the said indenture of the 8th of *April* 1826, to the plaintiff, whereof the plaintiff before the commencement of the suit had notice; and that no goods or chattels which were of the said *C. S. Goodwyn* at the time of his death had come to or been in her hands to be administered since she so became administratrix as aforesaid; whereof the plaintiff had notice; but that he, in breach of the said understanding, and of his said undertaking and promise, had sought, and seeks, by this action, to charge the defendant, as administratrix as aforesaid, with the said alleged breaches of covenant in the declaration mentioned. Verification.

The plaintiff, in his replication, confessed the first plea, and prayed judgment of assets *in futuro*. To the second plea he replied, that he did not undertake or promise, nor was it understood by and between the plaintiff and the defendant, that if the defendant applied for and took out administration of the goods, &c., the plaintiff would not charge, or seek to charge, her, as such administratrix or otherwise, with any breaches of the said covenants contained in the said indenture of the 8th of *April* 1826, or the said indenture of the 10th of *August* 1826; nor did the defendant, on the faith of

such understanding, undertake or promise, *modo et forma*, — concluding to the country.

At the trial before *Coltman J.*, at the sittings at *Westminster*, after *Trinity* term, 1840, a verbal engagement entered into by *Duncombe*, the plaintiff's attorney, with *Young*, the defendant's attorney, on the 11th of *June* 1838, to the effect stated in the last plea, was proved by *Young*; after which, the plaintiff's counsel not contending that such an engagement had not been entered into, sought to engraft upon it a condition, which, it was suggested, had not been complied with on the part of the defendant. It was further contended for the plaintiff, that the parol engagement entered into by him, whether conditional or absolute, was no answer to a liability created by an instrument under seal; and that, even supposing a deed to be unnecessary, as the arrangement relied upon by the defendant related to an interest in land, it required, under the statute of frauds, to be proved by a memorandum in writing. The learned judge left it to the jury to say, whether the agreement was conditional or absolute; and directed them to find a verdict for the defendant on the issue joined upon the replication to the last plea, if they were of opinion that no condition had been annexed to the promise, with leave to move to enter a verdict for the plaintiff. The jury returned a verdict for the defendant upon the issue, and assessed the damages on the judgment of assets *quando acciderint*, at 28*l.* 14*s.* 6*d.* (a)

(a) Although the *venire facias* required the jury to assess the damages upon the judgment of assets *quando acciderint*, that assessment would be rendered unnecessary by a finding for the defendant upon an issue joined on a plea in bar of the whole action. Thus, where in a joint action against *A.* and *B.*,

A. suffers judgment by default and *B.* pleads non assumpsit, though the *venire* is, *tam ad triandum quam ad inquirendum*, no damages can be assessed against *A.* if the verdict upon the issue be found for *B.* In the principal case, the assessment would be made by an express or tacit consent on

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In *Michaelmas* term, 1839, *Bompas* Serjt. obtained a rule nisi to enter a verdict for the plaintiff upon the issue joined upon the replication, pursuant to the leave reserved, or for a new trial, or for judgment for the plaintiff *non obstante veredicto*. He cited *Thompson v. Brown (a)*, *Sellers v. Beckford. (b)*

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In *Michaelmas* term last, *Peacock* shewed cause. It is conceded on the part of the defendant, that no agreement under seal was proved. [*Coltman* J. A parol agreement will not answer his purpose. *Tindal* C. J. Admitting that the plea alleges only that there was an agreement, without saying any thing to bind the defendant to prove either a parol agreement, or an agreement under seal, still if the counsel for the plaintiff had objected, the defendant could not have obtained a verdict without shewing an agreement under seal.] It is submitted that according to the true construction of the plea, it only sets up a parol agreement, which agreement was proved at the trial. The plea alleges an express agreement between the parties; but it contains nothing from which a contract under seal can be implied; and the replication takes issue in the terms of the plea. If a deed were necessary, undoubtedly this plea would not be sufficient after verdict; as, according

the part of the defendant, given to avoid the necessity of a writ of inquiry in case judgment should be entered for the plaintiff *non obstante veredicto*.

With respect to writs of inquiry, it may not be improper to observe, that since the abolition of writs of attain, by 6 G. 4. c. 50. s. 60., a writ of inquiry may issue in many cases where formerly a *venire facias de novo* was required; the ground on which a new trial of

the issue was held to be necessary being, that the parties were entitled to their writ of attain, which they could not have had upon a mere assessment of damages under a writ of inquiry. *Com. Dig. Attaint (B).*; *Kynaston v. Mayor of Shrewsbury*, 2 *Stra.* 1052.; 2 *Nev. & Mann.* 324. n.

(a) 7 *Taunt.* 656.; 1 *B. Moore*, 358.

(b) 8 *Taunt.* 31.; 1 *B. Moore*, 460.

to the common understanding of the language of the plea, it is inapplicable to a contract under seal; and this is not like the case of a corporation, where *after verdict* it may be presumed, that what was done was properly done. So an inrolment, in the case of a conveyance by bargain and sale, and an attornment, in the case of a grant of a reversion or remainder, will, after verdict, be presumed to have been proved at the trial, because these acts being incident to the particular forms of conveyance, and necessary to complete them, no such bargain and sale, or grant, could have been proved before the jury, unless the inrolment or the attornment had been shewn. Although that is not the case here, still all that the defendant has undertaken to prove is, that some contract was entered into between the parties to the effect stated in the plea. [*Maule J.* The question is, whether the plaintiff could, without a deed, effectually promise not to sue — whether such a promise would not be void?] If the plaintiff intended to raise the point, that an undertaking not to sue would be insufficient unless under seal, he should have demurred to the plea; instead of which he has taken issue, and has driven the defendant to prove the truth of a plea which she has established in evidence. [*Bosanquet J.* You contend that such a contract as the defendant has set out in her plea, though no answer to the action, is not an absolute nullity. *Tindal C. J.* Suppose a release were pleaded to an action on a bond, would not that import a release under seal?] In a note to *Stennel v. Hogg (a)*, it is laid down “that if the plaintiff states a defective title, or totally omits to state any title or cause of action, a verdict will not cure such defect, either by the common law or by the statute of jeofails; for the plaintiff need not prove more than what is expressly stated in the declaration, or is *necessarily* im-

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(a) 1 *Wms. Saund.* 228. b.

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plied from those facts which are stated." (a) The same rule, it is conceived, will apply to the plea now before the court.

But further it is submitted, that the contract entered into between the plaintiff and the defendant, whether under seal or by parol, would be binding upon the plaintiff, and would disentitle him to sue the defendant upon any of the covenants of this lease. This is not like the case of a party entering into a covenant by deed, and then setting up a parol engagement by which he is relieved from that covenant; it is not the case of a covenantee agreeing not to sue the covenantor upon his contract under seal. Here, the subject of the engagement was, the taking upon herself by the defendant of the office of administratrix, which is not a matter under seal. (b) The defendant has entered into no covenant; and she would have been liable to no action, but for the very act which she did at the instance of the plaintiff, and upon his engagement not to sue her. No authority has been found applicable to this case; but it is evident that it differs entirely from those cases in which it has been held, that a contract can be dissolved only by an instrument of equal degree by which the contract was created. (c) Here, it is not contended, that the plaintiff has abandoned his right to sue upon any covenant. [*Maule J.* Suppose the plaintiff had made this promise under seal, might not the defendant have pleaded it as a release? And, if so, is not this a parol release?] A promise by deed not to sue may be

(a) Citing 2 *Dough.* 658.; 2 *Cowp.* 825.; 2 *Salk.* 662.; 1 *Salk.* 365.; 3 *Burr.* 1728.; 3 *Wils.* 275.; 1 *T. R.* 141. 146.; 4 *T. R.* 472.; *Gilb. Hist. C. B.* 141, 142.

(b) Suppose the defendant had been sued as assignee of

this lease, might she not have shewn that the lessee had *without deed*, (though by note in writing to satisfy the statute of frauds,) assigned to *J. S.*?

(c) *Vide Rex v. Bingham*, 3 *Young & Jerv.* 101., 1 *Cro. & Jerv.* 245. 379., 1 *Tyrwh.* 46.

pleaded as a release; but a parol agreement not to sue does not amount to a release.

Assuming the issue to have been proved by a parol agreement, and that such parol agreement would not be sufficient to bar the action, the only mode of giving effect to the objection would be by entering judgment for the plaintiff *non obstante veredicto*. But the plaintiff cannot have judgment *non obstante veredicto*; for he is not entitled to judgment upon a verdict, which would entitle him to costs. The plea states, that the defendant has fully administered. It alleges, that "no goods or chattels which were of the said C. S. Goodwyn at the time of his death had come to, or been in her hands to be administered since she became administratrix." This allegation is not denied by the replication, so that in fact the plaintiff has admitted, that no assets have ever come to her hands. [*Maule J.* The plea, in fact, is double; or you *may* say that it is single, the first part being irrelevant, and affording no defence to the action.] Although a plea be double, yet, if it is not demurred to, it will be available to the party pleading it. Here, the plaintiff has upon the first plea obtained judgment of assets *quando acciderint*, and that is all he would be really entitled to upon this issue, if it had been found for him; whereas, if the court authorize the plaintiff to enter a verdict generally upon this issue, the plaintiff will enter up judgment immediately for the debt, *de bonis testatoris*, and for the costs, *de bonis testatoris, et si non, de bonis propriis*. And not only will the defendant be chargeable personally with the costs, but she may be made liable for the debt as upon a *devastavit*. Supposing the first part of the plea to be bad, the plaintiff should, in respect of the allegation of *nulla bona* in the latter part of the plea (a)

(a) The second plea states which were of the testator, had that no goods and chattels, come to, or been in, the hands

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and with which that plea concludes, have prayed judgment of assets *quando acciderint*, as well as in his first plea. The plaintiff cannot, upon these pleadings, be entitled to judgment against the defendant as administratrix. [Maule J. to Bompas Serjt. Do you ask for judgment *de bonis propriis*? Bompas Serjt. I ask that a verdict should be entered for the plaintiff upon the issue.] If the verdict were entered for the plaintiff, he would, after judgment against the defendant as administratrix, and *nulla bona testatoris* returned by the sheriff to a *fieri facias de bonis testatoris*, be entitled to suggest a *devastavit*. [Maule J. Not so, where a plea of *plene administravit* is confessed upon the record. (a)] Where an issue is taken upon general or special pleas of *plene administravit*, the plaintiff, if the issue be found against him, can have judgment of assets *quando acciderint*. (b) [Maule J. The second plea, if established, is an answer to the action, and the plaintiff can get nothing; but if the plea is not established, should not the plaintiff have something when assets come in? Tindal C. J. Suppose an insufficient plea of *plene administravit* to be pleaded, is the plaintiff not to recover his costs? Though the plaintiff cannot have judgment of

of the defendant to be administered since she became administratrix; but it does not allege that she had fully administered. It appears, however, that an executor, &c. cannot plead *riens en ses mains*, without adding that he has fully administered, in any case except to a *scire facias* on a judgment; for he may have committed a *devastavit* by a release, although he never had the goods in his hands. *Trin. 9 Ann. B. R., Peck v. Peck*, 11 *Vin. Abr.* 342. *Executors* (Z. a. 6.) pl. 89. In *M. 10 H. 6*, fo. 22, pl. 74.,

riens entermaines was held to be no plea; but there the allegation was only "*riens entermaines jour del breve purchase, vel unquam postea.*" And see 13 *H. 6. Fitz. Abr. Barre*, pl. 52.; *Doctrina Placitandi*, 171.; *Style's Rep.* 405.; *Anon. 2 Keble*, 762. pl. 32. See also, *M. 34 H. 6*, fo. 24, pl. 42.; *T. 33 H. 6*, fo. 24, pl. 1.; 4 *Mann. & Ryl.* 612. n.

(a) *Quære*, how far the insufficiency of the second plea could be aided by the first.

(b) 2 *Wms. Saund.* 216. n.

assets *quando acciderint* where he takes issue upon a plea of *plene administravit* which is well pleaded, the same consequence does not seem to follow where *plene administravit* is ill pleaded.] Here, that part of the plea which alleges an administration of the effects of the testator, is good (a), and that allegation is admitted by the plaintiff to be true. It is the plaintiff who has thrown upon the defendant the necessity of going to trial. [*Maule J.* But not of going to trial upon the *plene administravit*. What is to be done upon the second plea, if the plaintiff is not to have judgment of assets *quando acciderint* ?] The plaintiff does not ask for judgment of assets *quando acciderint* upon that plea, but for a general judgment, *quod recuperet*, against the defendant as administratrix. (b) Having prayed that judgment, he cannot now ask the court for a different judgment.

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In this term, *Talfourd Serjt.* was heard on the same side. This rule was moved for on the authority of *Thompson v. Brown*, in which case it was held, that, in covenant upon a charter-party, the charterer could not recover freight accruing upon a voyage substituted by parol for the voyage mentioned in the charter-party. The principle of that case is, however, inapplicable here. It is not sought to vary the contract under seal. The plea does not contravene any one of the stipulations in the deed, but sets up a matter wholly collateral to the deed. It surely will not be contended that fraud practised by the plaintiff upon the defendant in this transaction, would not have affected his right of action against her. [*Maule J.* A parol promise not to sue, if founded

- (a) *Sed vide supra*, 413. (a).
 (b) A plaintiff who takes judgment of assets *quando acciderint* upon a plea of *plene administravit*, and obtains a verdict upon a plea of "non assumpsit testator," is entitled to judgment for the costs, *de bonis testatoris, et si non, de bonis propriis*. *Marshall v. Wilder*, in Error, 9 B. & C. 655.; 4 Mann. & Ryl. 607.

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upon a good consideration, is valid; but the question is, whether a parol promise not to sue can be pleaded in bar of the action. It looks like an accord unexecuted. *Tindal* C. J. Would it not rather be the ground of a cross-action? (a) *Maule* J. Suppose a covenantee were to promise that if the covenantor would execute the deed, he would not enforce a particular covenant contained in the deed. *Tindal* C. J. Here, the executors and administrators of the lessee are expressly named in the lease. (b)] The supposed liability of the defendant does not arise out of any matter in writing to which she is a party. But supposing the agreement between the parties not to affect the liability of the defendant to be sued as administratrix, the issue taken is immaterial, and instead of judgment for the plaintiff *non obstante veredicto*, there ought to be a repleader.

Bompas Serjt. *contra*. The plaintiff charges the defendant in this action only as the personal representative of her late husband. In *Kaye v. Waghorn* (c) it was held, that a bond made and accepted in lieu and in satisfaction of a covenant before it was broken, could not be pleaded to an action brought for a breach of such covenant. In *Sellers v. Beckford* (d) it was held, that leave and licence could not be pleaded to a breach of a bond conditioned for the not opening of a shop within certain limits. [*Maule* J. That must have been a licence before breach. (e)] Every material allegation in

(a) *Vide Braddick v. Thompson*, 8 *East*, 344.

(b) It might, perhaps, be urged, that *expressio eorum qui*, as well as *quæ, tacite insunt, nihil operatur*.

(c) 1 *Taunt.* 428.

(d) 8 *Taunt.* 31.; 1 *B. Moore*, 460.

(e) In the marginal note to that case, in 1 *B. Moore*, 460., it is said that the plea was held bad, on general demurrer, on the ground that a licence *after breach* was not good unless by deed. But the words of the plea in that case are, "that the defendant, by the leave and licence

this plea is traversed by the replication. [*Tindal C. J.* The plaintiff might have denied that he accepted this agreement in satisfaction.] This is not a plea in accord and satisfaction of the debt and damages, inasmuch as, by the agreement set out in the plea, the plaintiff was to be at liberty to sue any other parties who might be liable in respect of the covenants of the lease. [*Talfourd Serjt.* That does not appear on the record; and the jury disbelieved the condition which the plaintiff sought to engraft upon the agreement.] As no deed was produced at the trial, the plaintiff is entitled to have the verdict entered for him upon the issue. *Stennel v. Hogg* (a) shews that the court will intend, after verdict, that the agreement was by deed. [*Tindal C. J.* That was *in support* of a verdict.] It appears from that case, that where a jury has found a verdict, every presumption will be made to make the finding effectual. [*Coltman J.* Where a grant is alleged in pleading, and found by the jury, it will be presumed to be by deed, because it could not otherwise be a grant in point of law; but the allegation of a promise does not imply the existence of a deed.] It is submitted that a promise by deed would be implied, if a deed were necessary to support the verdict. In *Hitchins v. Stevens* (b) it was held, that matter of substance, as an attornment before the statute of *Anne* (c), might be implied, to support a verdict.

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TINDAL C. J. (after stating the pleadings and the rule.) The only question before the court arises upon the second plea, to which the plaintiff has, virtually,

of the plaintiff, to him for that purpose *first* granted, did open and keep a shop," &c. (the act which constituted the breach).

(a) 2 *Saund.* 226. *antè*, 411.
(b) 2 *Shower*, 244. And see
2 *N. & M.* 36.; 5 *B. & Ad.* 27.
(c) 4 & 5 *Anne*, c. 16. s. 9.

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replied, that no such promise was made by him as that stated in the plea. This plea appears to me to be bad *non obstante veredicto*. The plea does not state a release under seal of the same nature as the obligation which is under seal. Neither does the plea set up an accord and satisfaction. The seal of the lessee affixed to the lease or counterpart binds him and all those who claim under him. It is no answer to such a declaration as this, that the defendant has clothed herself with the character of administratrix upon the faith of a representation made to her that she would be exempt from the consequences of taking such a step. If the defendant was induced to take out administration to her husband's effects upon such a representation, that might be a ground for applying to this court to restrain the plaintiff from bringing an action against her in that character, or for applying to the ecclesiastical court to recall the letters of administration. The parol agreement, pleaded, not by way of accord and satisfaction for the damages resulting from a breach of the covenant, but in discharge of the defendant's liability, is no answer to the deed, to which the defendant, virtually, is a party.

The next question is, whether the plaintiff is entitled to have a verdict entered for him on the issue taken upon the plea, on the ground that it must be assumed that the promise stated in the plea was by deed, inasmuch as a promise of a less formal character would be no answer to the action. I have always understood the rule to be, that after a verdict every thing shall be presumed which is necessary to make out the allegations in the declaration. Thus, in the case of a bargain and sale of a reversion, an attornment by the tenant would be assumed. (a) But the defendant asks the court to go

(a) *i. e.* before the 4 & 5 Anne, c. 16. by which (s. 9.) conveyances operating under the statute of uses had their full ef-
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a step further, and to substitute a different issue for that which the parties have agreed to try. I agree that we ought to assume all that was necessary to constitute a good parol promise; such a promise, and nothing more,

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fect without attornment. Where, therefore, a reversion was conveyed by bargain and sale inrolled, no attornment was necessary. Where the conveyance of a reversion was by lease and release, i. e. by a bargain and sale for a year, followed by a release operating at common law upon the possession acquired under the statute, an attornment would appear to have been equally unnecessary; since the bargain and sale for a year placed the bargainee in the same situation as if he had had a grant of the reversion for a year, to which the tenant had attorned; the subsequent release operating merely as a release *pur enlarger l'estate*, and not as a further grant of the original reversion. In *Hitchins v. Stevens*, 2 Shower, 233. it is said that in debt for rent by the bargainee of a reversion, the omitting to state an attornment in the declaration is aided by the verdict. But in the report in Sir Thomas Raymond, 487. the title is set out at length, and it is stated that the plaintiff declared as grantee of the reversion. It appears also that the reversion granted to the plaintiff was a reversion for years, which, of course, would not pass by bargain and sale; for though a term of years may be created by bargain and sale, where the bargainor has the freehold, the chattel interest so created can afterwards be transferred only

by a common law conveyance. The discrepancy between *Shower* and *Raymond* is explained by the report in Sir Thomas Jones, 232., where it appears that the conveyance was really by deed of bargain and sale, but that the court holding, that it could not operate under the statute of uses, the reversion being only a chattel, the question arose as to the effect of the verdict in curing the want of the allegation of an attornment. The reason of the rule, that upon a conveyance taking effect under the statute of uses no attornment was necessary, (see *Long v. Buckridge*, 1 Stra. 106.), seems to be this, that the statute of uses directs that the estate, title, right, and possession of the persons seised to the use, &c. shall be clearly deemed and adjudged to be in them that have such use, &c., after such quality, manner, form, and condition as they had before, in or to the use, &c., that was in them. Therefore, in the case of a conveyance taking effect solely under the statute, a usufructuary or beneficial interest is created at common law, to the extent of the whole estate intended to pass; and that interest is converted into a legal estate by the statute. This reason, however, it is true, appears to hold good only with respect to those conveyances which, as in the case of a bargain and sale, or covenant to

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BOSANQUET J. The first question in this cause is whether the issue taken upon the defendant's plea, the proof of which lies upon the defendant, was proved. If it was not, the plaintiff is entitled to have a verdict entered for him, the objection having been taken at the trial. What is the true meaning of that issue? The issue is, whether the plaintiff undertook and promised, or whether it was understood between

stand seised, operate under the statute *per se*, or, as it is called, without transmutation of possession. In the case of a conveyance operating under the statute *with* transmutation of possession, an attornment would appear to have been necessary before the 4 & 5 *Anne*; as where *A.* granted a reversion to *B.* to the use of *C.*, *B.* would not be seised, and *C.* would have no complete estate in the use at common law, until the tenant had attorned to the grant. There would be therefore nothing for the statute to act upon; and it appears to make no difference, whether the conveyance by transmutation of possession was made, as above, to a third person, or to *cestui que use* himself. It would seem, therefore, that a conveyance of a reversion *with* transmutation of possession, though operating under the statute of uses, would have required an attornment before the statute of *Anne*.

With respect to the *profert* of deeds operating under the statute of uses, the rule may

perhaps be thus laid down. In cases of conveyance by bargain and sale, the deed is properly in the custody of the bargainor until enrolment, and after enrolment (which is required only where a freehold passes), it ought to remain in court. No *profert*, therefore, by the bargainee is in any case necessary. In cases of covenants to stand seised, the deed belongs to the covenantee, and *cestui que use*, unless he be himself the covenantee, is not bound to bring it into court. With respect to deeds operating under the statute, by way of transmutation of possession, the distinction seems to be, between conveyances to third persons and conveyances directly to *cestui que use*. Thus, where *A.* grants to *B.* to the use of *C.*, the transfer of the deed is considered, *at law*, as reaching no further than *B.*; but where *A.* grants to *C.* to the use of *C.*, the property in the deed passes at once, *at law* as well as in equity, to *C.*, who, in pleading such deed, ought to bring it into court.

the plaintiff and the defendant, that, if the defendant applied for and took out administration of the goods, chattels, and credits which were of *C. S. Goodwyn* deceased at the time of his death, with the will of the said *C. S. Goodwyn* annexed, he, the plaintiff, would not charge, or seek to charge her, as such administratrix or otherwise, with any breach of the said covenants contained in the indenture of the 8th of *April* 1826. It is contended, on the part of the plaintiff, that the allegation in the plea which is embraced by the issue, imports that the plaintiff covenanted by deed. But can this be said to be an informal allegation of a contract by deed? It is said that, after verdict, it must be assumed that the promise set forth in the plea was under seal, on the ground that a promise, without deed, would be no answer to the action; but I am not aware of any case which goes to the extent of that proposition. If the allegation merely imports, as I think it does, a parol promise, the plea was proved, and therefore the plaintiff is not entitled to have the verdict entered for him.

With respect to the second point, — whether the plaintiff is entitled to judgment *non obstante veredicto* — I am of opinion that he is so entitled; as a covenant broken by the testator could be released only by deed. (a)

COLTMAN J. The first question is, how the postea ought to stand — whether I ought to have directed the jury to find a verdict for the defendant. The jury being of opinion that the parol promise was proved, it appeared to me that I was bound to direct them to find their verdict for the defendant. There is no little difficulty as to the doctrine of presumptions to be made after verdict. Some of the cases go to a great length. In *Spieres v. Parker* (b) Buller J. says (c), “As to its being intended after verdict, nothing is to be pre-

(a) *Sed vide ante*, p. 412. (b) 1 T. R. 141.

(c) *Ib.*, 145.

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sumed but what is expressly stated in the declaration, or what is necessarily implied from those facts which are stated. That is the case where a feoffment is pleaded without livery. (a) A livery is always implied, because it makes a necessary part of a feoffment. I know of no decision against this rule. There is, indeed, a dictum in a case which came before Lord *Hardwicke* in this court (b) which militates against it. That was an action to recover an amerciament in an inferior court; and the declaration did not state that the defendant was a resiant. There, the court held, that residence must be presumed to have been proved at the trial, otherwise the jury could not have found that there had been any debt at all; but there was a more solid ground for that decision in the subsequent part of the case." (c) Some of the cases mentioned by my brother *Manning*, in a note to 1 *M. & R.* 285., which are all cases of declarations, certainly go further. I do not know whether some of them do not go too far. I see nothing in this plea from which it can be inferred that the promise was made by deed; and, that being so, it appears to me

(a) No verdict seems to be required to supply what is here treated as the omission of an allegation of livery of seisin, such livery being a necessary incident implied in the word feoffavit. See *Co. Litt.* 303. b. "Livery shall not be pleaded where a man makes a lease for life or a gift in tail or in fee, but shall be intended to be made;" per *Walpole, Rastal, Rookby, and Gawdy, serjeants, arguendo* in *Throckmerton v. Tracy*, *Plowd.* 149. b.

(b) *Wicker v. Norris*, *Cases temp. Hardw.* 116.

(c) The point in this subsequent part was, that the day on which the court was held,

was laid under a *scilicet*, and, therefore, the holding of the court was not necessarily on the 27th of *October*, the only day mentioned. But if the words "the 27th, &c.," following the *scilicet*, were rejected, it would not appear *when* the court was held, and the objection that the resiancy of the defendant (which was stated to be *until* the 27th), and the holding of the court, were not alleged or shewn to be concurrent, would still remain; therefore, although Lord *Hardwicke* is represented to have said, "and that of itself is a full answer," the case appears to be carried no further than it was before.

to afford no answer to a declaration upon a contract under seal.

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MAULE J. I also am of opinion, that the verdict is properly entered for the defendant. The plaintiff says, that the plea ought to be understood as setting up a contract by deed, because a promise by deed was necessary, in order to make the plea a good answer to the declaration. I agree that where the plaintiff does not demur, the plea should, if it possibly can, be understood in a sense in which it is an answer to the action. (a) It is the same thing, whether the plaintiff traverses the plea or pleads over. I do not however find any case in which it has been held, that you can supply an omission for the purpose of making a plea a good plea. I take the rule to be, not that you are to supply by intendment matter which is omitted, but that you are to understand that which is alleged in a sense which will support the plea. In *Dean v. James* (b) it was held, that an allegation in pleading, that the debt sued for had been assigned by the plaintiffs, did not import that the defendant had notice of the assignment. That was not after verdict, but after pleading over; which is, for this purpose, essentially the same thing, for if issue had been taken upon any subsequent pleading, the question would have arisen *after verdict*. That circumstance would, therefore, make no difference. (c) But this is a plea of a parol promise, not to sue, made after the covenant is broken; which I think would be a bad plea in any case.

Rule absolute for judgment for the plaintiff, *non obstante veredicto*. (d)

(a) *Antè*, Vol. I. 731. (a).

(b) 1 *Nev. & M.* 392.; and see *S. C. 4 B. & Ad.* 546.; *Pothier, Contrat de Vente*, Partie VI. Chap. IV. No. 550—599. *antè*, Vol. I. p. 972.

(c) But the defect would, in

the one case, appear to be cured by a verdict at common law; in the other, after a verdict by the statutes of jeofails.

(d) And see *Gwynne v. Davy*, *antè*, Vol. I. p. 857.

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Jan. 21. SAMUEL DAVY, and SARAH ANN his Wife, and Others, to GEORGE MALTWOOD.

An affidavit, verifying the due taking, in *Russia*, of the acknowledgment of a deed by a married woman, made before the *British* consul, was held sufficient; it having been stated in a notarial certificate, made in a former case, that the laws of *Russia* do not grant authority to any magistrate to administer oaths to any person whatsoever.

IN October 1840, a special commission was obtained to take the acknowledgment of *Sarah Ann*, the wife of *Samuel Davy*, then and still residing at *St. Petersburg*, in *Russia*, of a deed executed by her on the conveyance of a copyhold, parcel of the manor of *Lambeth*, to which she was entitled with her two sisters, in coparcenary. The acknowledgment being taken, and the common certificate of acknowledgment (a), and an affidavit of the due taking, being returned, those documents were brought for enrolment, pursuant to the 3 & 4 *W. 4. c. 74. s. 85.*; but the officer appointed by the court, refused to file them without the order of the court, on the ground that the affidavit of the due taking of the acknowledgment appeared to be sworn before the *British* consul at *St. Petersburg*, and that a consul did not come within the description of "a person duly authorized to take affidavits in the court of Common Pleas," or "a magistrate."

On a former day in this term, *Talfourd* Serjt. moved that the certificate might be inrolled. The rules made in *Hilary* term 1834 are silent as to the description of persons before whom the affidavit is to be sworn. The practice with respect to acknowledgments taken abroad is understood to have arisen out of the adoption, by the officers, of the regulations prescribed by the rule of this court of *Hilary* term, 14 *G. 3. (b)*, as to common reco-

(a) *Vide Pearsall and Wife to Pearsall, antè, Vol. I. p. 973.*

(b) By that rule it is ordered, "that if the party or parties shall be in *Ireland*, or in any other part or parts beyond the seas, then the affidavit or affidavits shall be made by

veries; which regulations had been previously adopted as to fines, *Cruttenden v. Bourbel*. (a) A consul is not a magistrate; but he is a person authorized to administer oaths under the 6 G. 4. c. 87. s. 20., and is much more competent to administer the oath correctly than a *Russian* magistrate ignorant, probably, of the language and of the usages of this country. It is suggested, though the fact is not embodied in an affidavit, that in *Russia* a great difficulty exists in obtaining the administration of oaths. In *France*, the magistrates refuse to administer oaths in such cases; and the court now receives affidavits sworn in that country before the *British* consul or vice-consul, although formerly the [practice, as to fines, was otherwise: *Hutchinson, ex parte*. (b) The learned serjeant referred also to cases of acknowledgments taken at *Hamburg*. *Edye and Others to Lord Rolle*. (c)

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TINDAL C. J. An affidavit may probably be made, that a difficulty exists in getting an affidavit sworn before a magistrate in *Russia*; if not, the affidavit should go back to be resworn.

Talfourd Serjt., on this day renewed his application, and referred to a case in which this court had, two years before, upon a notarial certificate as to the state of the law of *Russia* in this respect, allowed the certificate of an acknowledgment taken in *Russia* to be inrolled. In that case a

one of the commissioners who hath taken the acknowledgment of the warrant or warrants of attorney, and shall be sworn either before some person duly authorised to take affidavits in this court, or before some magistrate, of the place, where such acknowledgement shall be taken, having authority to administer an oath, and in the presence of a public notary, which notary

shall also certify in writing, under his hand and seal, as well the due administering of this oath, as also the name, signature, and office of the magistrate administering the same."

(a) 1 *Taunt.* 144.

(b) 4 *Bingh.* 606., 1 *Moo. & P.* 559.

(c) *S.'C.* reported by the name of *In re Eady*, 6 *Dowl. P. C.* 615.

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commission had issued to take the acknowledgment of Mrs. *Sophia Gordon Handyside*, then residing at *St. Petersburg*, and the notarial certificate concluded as follows :

“ And I further certify that the laws of *Russia* do not grant the authority to any magistrate to administer oaths to any person whatsoever. And that in virtue of an act of parliament passed in the reign of His late Britannic Majesty *George IV. (a)*, the *British* consul is authorized to administer oaths.

“ THOMAS BISHOP,
(Not. Pub.) ”

“ 16 Aug. 1838.

“ *Old Style.* ”

TINDAL C. J. I think the document may be in-rolled.

The rest of the court concurring —

Order made.

(a) 6 G. 4. c. 87. s. 20. *parte*, 4 Bingham. 604. ; 1 Moore & Payne, 559.
But as to the operation of this statute, see *Hutchinson, Es*

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LONGBOTTOM v. RODGERS.

Jan. 12.

ASSUMPSIT, for work and labour, for money paid, and upon an account stated. Plea: non assumpsit.

The plaintiff claimed 20*l.* for personal services, and 10*l.* for money paid in treating electors.

At the trial before *Erskine J.*, at the sittings at *Guildhall* after last *Michaelmas* term, the following facts appeared:—

The defendant, an attorney, was the honorary secretary of a committee for conducting the election of one *Walter*, a candidate, in 1840, for the representation in parliament of the borough of *Southwark*. He was also *Walter's* principal agent, and in that capacity retained and employed one *Johnson*, who, with the previous knowledge, or the subsequent assent, of the defendant, engaged the plaintiff as a canvasser, and also as a treater of certain electors called the *Long Shore* voters.

Johnson swore that he told the plaintiff, that the defendant would pay him, as the defendant knew that he, *Johnson*, had employed him.

For the defendant it was insisted, that, throughout the transaction, the defendant had interfered only as the known agent of *Walter*.

The learned judge told the jury, that the first question for their consideration was, whether the plaintiff had performed the services *for a pecuniary consideration*; and that, supposing that point to be found by them in the affirmative, a second and more important question would arise, whether the defendant *had made himself a contracting party*; which, as he was known to the plaintiff, in the transaction, as the agent of *Walter*, he could only do by an undertaking on his part to be *personally* liable for the services; and that this would

An election agent is not liable to be sued for the services of persons employed by him in canvassing voters, without proof of an undertaking on the part of such agent to make himself personally liable for those services.

But slight evidence is sufficient to shew that the credit was given to the agent.

1841. principally depend upon the question, whether *Johnson*
 — had any authority from the defendant to represent to the
 LONGBOTTOM plaintiff that the defendant would pay him; and that,
 v. at all events, the sum of 10*l.*, claimed for treating, could
 RODGERS. not be recovered, such a transaction being illegal. The
 jury returned a verdict for the plaintiff, with 20*l.* damages.

Bompas Serjt. now moved for a rule nisi for a new trial. The defendant acted throughout as the known agent of *Walter*; and though the learned judge told the jury, that to entitle the plaintiff to a verdict it was incumbent on him to shew that the defendant had taken the liability upon himself personally, it is submitted that that was not sufficient, and that the learned judge ought to have directed the jury that there was *no* evidence of liability. [*Maule* J. At elections (a) it is the agent who contracts.] In *Paley's Law of Principal and Agent* (b), it is said, "In general, where a man is known to act merely as an agent,—where the principal is known, and there is no express engagement by the agent, nor circumstances from which it may be inferred that the credit is given to him,—the rule is, that the agent, though the person immediately making the contract, is not subject to personal responsibility." Unless an express contract had been entered into on the part of the agent, the agent was not liable. [*Bosanquet* J. One person who requests another to do an act for the benefit of a third, makes himself personally liable to the party whom he so employs. (c)]

TINDAL C. J. I am not satisfied that there was not *some* evidence that the defendant meant, and that the

(a) *Post*, 429. (b)
 (b) P. 246. And see *Alford*
v. Eglisfield, *Dyer*, 230. b.;
Goodbaylie's Case, *ibid.* in
 marg.; *Woodhouse v. Bradford*,
 1 Roll. Abr. 593, 594., 7 Vin.

Abr. 331. pl. 13.; *Macbeath v.*
Haldimand, 1 T. R. 172. 181.
 (c) And see *Burrell v. Jones*,
 3 B. & Ald. 47.; *Iveson, Gent.*,
v. Conington, Gent., 1 B. & C.
 160., 2 Dowl. & R. 307.

plaintiff understood, that the defendant was to be liable to pay the plaintiff for his services. Looking at the course of dealing, it does not appear to me to be clear that the defendant did not give the plaintiff to understand that he was to look to him for payment. This is not, indeed, exactly like the case of a *West India* estate, in which the credit is *always* given by the person who furnishes the supplies, to the merchant in *England*, and not to the planter abroad. But, in this case, a little thing would be sufficient to shew that the credit was given to the agent.

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BOSANQUET J. I am of the same opinion. I think there was evidence to go to the jury. There is no inconsistency in the defendant's being agent to *Walter*, and yet being the person who was to pay the plaintiff. (a)

MAULE J. I also think there was evidence to go to the jury. When it is said that the defendant was agent to *Walter*, that does not necessarily mean that *Walter* was the person to be looked to for all purposes.

ERSKINE J. I thought, at the trial, that there was evidence, for the jury to consider, whether *Johnson* was authorised to make the representation to the plaintiff that the defendant would pay him ; and I left the case to the jury with the observation, that unless the defendant has agreed to take upon himself the liability, he was not chargeable in this action. It was a case in which different persons might come to different conclusions.

Rule refused. (b)

(a) And see P. 18 H. 4., *Fitz. Abr. Ayd de Roy*, pl. 100.

(b) As to the authority of an election agent, see *Trelawney v. Thomas*, 1 H. Bla. 308.; *Honeywood v. Geary*, coram Sir J. Mansfield C. J., 6 Esp. N.

P. C. 119., *Felton v. Easthorpe*, coram Abbott C. J., sittings after Trinity term, 1822, *Rogers on Elections*, 5th ed. 238.; *Bremridge v. Campbell*, 5 Carr & P. 186.

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Jan. 16. W. H. AUSTIN and W. S. MASTERMAN v. EVANS.

A party non-suited for non-production of a document from a public office, is not entitled to a new trial on the ground of surprise, where he has served a clerk in the office with a *subpœna duces tecum* to produce the document, but has omitted to apply to the head of the office for permission for its production.

A plaintiff who chooses to be non-suited in order to avoid an impending verdict for the defendant, cannot have a new trial on the ground that there was evidence to go to the jury.

DEBT, for work and labour as an attorney and conveyance, for money paid, and on an account stated. Plea: *nunquam indebitatus*.

At the trial before the undersheriff of *Middlesex*, it appeared that the action was brought to recover 13*l.* 1*s.* 8*d.*, the amount of a bill of costs in preparing the accounts of the defendant as executor of his deceased partner *Nott*, to be filed at the legacy duty office; which demand the defendant resisted, on the ground that the business had been included in a final bill of costs incurred on the executorship account; which had been paid several years before to *Harman*, the plaintiffs' predecessor in business; and that the plaintiffs were employed, not by the defendant, but by *Harman*, to supply his own omission. *C. T. Masterman*, an accountant, proved that the account had been made up by him, by order of the plaintiffs; that he had called upon the defendant to ask if he could give any information as to the accounts, when the defendant expressed his surprise at finding that any thing remained to be done, but that he afterwards signed the accounts. *Means*, a clerk in the legacy duty office, who had been served with a *subpœna duces tecum*, to produce the executorship accounts, stated that they were filed in *April* or *May* last, but that he had not been permitted to bring them, as no application for such permission had been made to the comptroller.

The undersheriff having directed a nonsuit, (a)

Bompas Serjt., in last *Michaelmas* term, obtained a rule for a new trial on the ground of surprise, upon

(a) *Vide Watson v. Abbott*, 4 *Tyrrwh.* 64.

affidavits stating that the undersheriff had nonsuited the plaintiff in consequence of the accounts filed in the legacy duty office not being produced.

He also urged, that even without the accounts, there was evidence which ought to have gone to the jury.

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Wilde, Solicitor-General, now shewed cause, upon an affidavit stating that the undersheriff had told the jury that the plaintiffs had made out no case, not having proved any retainer; and that upon the defendant's counsel saying "then there must be a verdict for the defendant," the plaintiff *Austin*, who conducted his own case, said that he should prefer being nonsuited.

The undersheriff's notes are silent as to the ground of the nonsuit; but if it be taken that it proceeded upon the non-production of the accounts, the plaintiffs have no reason to complain of surprise. They were bound to know that a clerk in the legacy duty office has not the legal custody of the documents filed in that office; and that he would be guilty of a breach of duty if he brought away documents without the permission of the head of the office; *Thornhill v. Thornhill*. (a)

The plaintiffs are not in a situation to say that the evidence which they did produce ought to have gone to the jury, since they elected to be nonsuited to avoid a verdict for the defendant; *Simpson v. Clayton*. (b)

Bompas Serjt., in support of the rule. The plaintiffs were taken by surprise, no intimation having been given that the documents would not be produced.

The undersheriff, in effect, directed a verdict for the defendant. Against this misdirection the plaintiffs seek relief. It is immaterial whether the judge directs a

(a) 2 *Jac. & W.* 347. And see *Cooke v. Berry*, 1 *Wils.* 98.; *D'Aguilar v. Tobin*, 2 *Marsh.* 265. (b) 2 *New Cases*, 467.; 2 *Scott*, 691. And see *Le Fleming v. Simpson*, 1 *Mann. & Ryk.* 269.

1841. verdict for the defendant, and the plaintiff, to avoid
 ——— being concluded by that verdict, chooses to be nonsuited,
 AUSTIN or the judge directs a nonsuit, and the plaintiff, in order
 v. to avoid being so concluded, omits to insist upon his
 EVANS. right to appear.

TINDAL C. J. Upon the ground of surprise, the plaintiffs are not entitled to be relieved against the nonsuit recorded against them, inasmuch as they do not shew that all necessary care was taken by them to secure the production of the accounts.

Upon the second point, the acquiescence of the plaintiffs in the nonsuit is a sufficient answer.

Per curiam.

Rule discharged. (a)

(a) *Vide Kindred v. Bagg, Mason, 9 Price, 291.; Alexander v. Barker, 2 C. & J. 133., 1 Taunt. 10.; Butler v. Dorant, 3 Taunt. 229.; Ward v. 2 Tyrwh. 140.*

JOHNSTONE and Others v. M. E. FRIEDMANN,
 Executrix of J. W. FRIEDMANN, deceased.

A creditor
 proceeding
 both at law
 and in equity
 to enforce his

ASSUMPSIT, on bills of exchange accepted by the testator. Plea: rent due upon a demise (a) to the testator, accruing partly before and partly after his demand, an order is made in the court of equity, on the petition of the defendant, requiring the plaintiff to elect in which court he will proceed. The creditor elects to proceed in equity. The defendant may move for judgment as in case of a nonsuit at the time at which he would have been entitled to move for such rule if no such election had been made.

A defendant who has obtained a rule for the costs of the day, cannot move for judgment as in case of a nonsuit until after a fresh default.

(a) Though the demise was be pleadable though unpaid.
 by parol, the rent, being in the See the cases collected, *Williams' Executors*, p. 810. 3d ed.
 realty, would, as a specialty debt,

death, and *plenè administravit præter*. Replication: 1841.
assets ultra, concluding to the country; upon which issue
 was joined. Notice of trial was given on the 6th of JOHNSTONE
June 1840, for the sittings in *Trinity* term; but the re- v.
 cord was withdrawn. FRIEDMANN.

In the following *Michaelmas* term, *Manning* Serjt., for the defendant, obtained a rule for the costs of the day.

In the meantime the plaintiffs filed a bill against the defendant, praying, that an account might be taken of the debt due to them from the testator and of his effects, and that such effects should be applied in payment of the plaintiffs and his other creditors.

On the 30th of *October*, the defendant, having put in her answer, applied, by petition, to the Master of the Rolls, who made an order that the plaintiffs should, in eight days, elect in which court they would proceed; and that if they elected to proceed in Chancery, then the plaintiffs' proceedings at law were thereby stayed by injunction; but if they elected to proceed at law, or in default of election within the eight days, the bill to stand dismissed with costs. On the 14th of *November*, after the above rule for the costs of the day had been obtained, the plaintiffs elected to proceed in Chancery; and on the 25th of *November* an order was made by the Vice-Chancellor, referring it to the master to take the accounts, as prayed. After this order, the costs of the day, made out in the usual way, charging for resealing the *subpoenas*, and for refreshing fees to counsel, were taxed. Upon the taxation, it was objected, on the part of the plaintiffs, that these charges ought not to be allowed, inasmuch as the action at law, as far as the plaintiffs were concerned, was at an end; and they were disallowed accordingly. The following summons was then taken out by the defendant: — "Let the plaintiffs' attorney or agent attend me at, &c., to shew cause why the plaintiffs should not pay the defendant's costs

1841. in this action, they having elected to proceed in equity
 ——— for enforcing their claim; or why the master should not
 JOHNSTONE be at liberty to review his taxation of the defendant's
 v. costs of the day herein.
 FRIEDMANN.

“Dated, the 1st day of *December* 1840.”

The summons was duly attended before *Coltman* J. on the 2d of *December* last, when, after hearing the facts of the case, that learned judge expressed his opinion, that the master was right under the circumstances in disallowing the refreshing fees to counsel, and the costs of altering and resealing the *subpoenas*, and that the defendant ought to be paid the costs of the *action*; the learned judge, however, thought that he could not make the order prayed at chambers, but recommended an application to be made to the court in the alternative, for the plaintiffs to pay the defendant's costs of the cause, or for judgment as in case of a nonsuit.

In the beginning of the term, *Manning* Serjt. moved for judgment as in case of a nonsuit, and cited the case of *Anderson v. Tombs* (a) as directly in point. Although the plaintiffs were put to their election by reason of the petition filed by the defendant, the necessity for that petition was occasioned by the act of the plaintiffs in proceeding both at law and in equity. If the plaintiffs had elected to proceed at law, they would have been compellable to pay all the costs in equity, as their bill was to stand dismissed with costs, the object being to indemnify the defendant against costs which she would, upon such election being made, appear to have needlessly incurred; and no reason can be assigned why a corresponding result should not follow, when the plaintiffs, by electing to proceed in equity, have admitted that the proceedings taken by them at law, were unnecessary and vexatious.

(a) 2 *Anstr.* 568.

TINDAL C. J. The judgment in case of a nonsuit is given in lieu of the trial by proviso. How could the defendant take down the cause to trial by proviso, whilst the plaintiffs were stayed from proceeding in the action by an injunction to which she is a party? But, supposing the case in *Anstruther* to be rightly decided, the application is made too soon. You must wait for another default.

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JOHNSTONE
C.
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ERSKINE J. There has been no default since the last motion.

MAULE J. The defendant does not absolutely abandon all right to have judgment as in case of a nonsuit, by moving for the costs of the day. After another default a fresh application may be made.

Rule refused.

On a subsequent day, *Bompas* Serjt. obtained a rule *nisi* for judgment as in case of a nonsuit, upon a further affidavit shewing that the plaintiffs had omitted to go to trial at the sittings after *Michaelmas* term. This had not been stated in the affidavit upon which the former motion was made, both parties having treated the action as abandoned by the election made to proceed in equity.

Wilde, Solicitor-General, now shewed cause. The question is, whether the court can give judgment as in case of nonsuit, against a party who has a good cause of action, and who is willing, but is not allowed, to proceed. Judgment as in case of a nonsuit is given by the statute of 14 G. 2. c. 17. for a default in not proceeding to trial according to the course and practice of the court; by which is to be understood, such a voluntary omission to go to trial as would entitle the defend-

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 ———
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ant to carry down the record by proviso. *Anderson v. Tombs*, if correctly reported, must have been decided inadvertently, and cannot be law. No party is entitled to complain of delay when he himself is preventing his adversary from proceeding. The plaintiffs are willing to abide by the consequences of the election to which they have been put by the defendant. The defendant also must be content to abide by the consequences of that election, and to give up her costs.

Bompas and Manning Serjts., contra. The statute of 14 G. 2. c. 17. contains no reference to the trial by proviso, but directs that in all cases where the plaintiff neglects to bring the issue on to be tried according to the course and practice of the court, judgment as in case of a nonsuit shall be given. Here, the plaintiffs have neglected to bring the issue on to be tried according to the course and practice of the court; and the only excuse alleged is, that a court of equity will not permit them to harass the defendant with two suits, when, in the opinion of that court, the legitimate objects of the plaintiffs may be obtained in one. The right to judgment as in case of a nonsuit, and the right to carry down a record to trial by proviso, are not co-extensive; and the defendant is not bound to shew that she could, in this case, have carried down the record by proviso. In seeking to put a termination to this action by a judgment as in case of a nonsuit, the defendant only gives effect to the Vice-Chancellor's order; whereas, by carrying the record down for trial by proviso, she would have invited the plaintiffs to proceed in the action, in breach of the injunction.

TINDAL C. J. The case of *Anderson v. Tombs* is directly in point, and must, in a matter of practice, govern our decision.

Rule absolute.

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Jan. 12.

ON the 31st of *March* 1840, final judgment was signed against the defendant for 268*l.* 5*s.*, being the debt and costs in an action of assumpsit upon a promissory note for 240*l.* made by the defendant. A *testatum ca. sa.* was delivered to the sheriff of *London*, with instructions to return *non est inventus*, and the writ was so returned on the 1st of *June*; whereupon an *exigi facias* issued, and the sheriff caused the defendant to be once demanded. Before any further steps were taken on the part of the plaintiff, the defendant obtained a summons to set aside the proceedings for irregularity, with costs, the defendant being a member of the House of Commons. The summons was attended before *Erskine J.*, at chambers by counsel, *Humfrey* appearing for the plaintiff, and *Archbold* for the defendant, when, after much discussion and after time taken for consideration, the following order was made:—

A *capias ad satisfaciendum* issued against a member of parliament in an action of assumpsit, is irregular; although delivered to the sheriff, with a direction to be returned "*non est inventus*," in order to ground proceedings to outlawry. (a)

Cassidy v. Steuart.— Upon reading the affidavit of *R. K. Lane*, gentleman, the affidavit of *Frederick William Fisher*, and the paper-writings thereunto annexed, marked A. and B., and upon hearing counsel on both sides, I do order that all proceedings to outlawry against the defendant in this cause be set aside for irregularity, with costs to be taxed and paid by the plaintiff, the defendant being a member of parliament. Dated, the 29th day of *June* 1840.

(Signed) T. ERSKINE.

At the time of pronouncing the judgment upon the

(a) But after judgment upon a statute-staple, or statute-merchant, or upon the statute of *Acton Burnell*, a *capias ad satisfaciendum* lies even against

peers of the realm, *Bac. Abr. tit. Privilege (C)*, 7., 5th and 6th ed. vol. v. 645.; *Anon.* 4 *Leon.* 6. For the reason see post, 464.

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summons, the learned judge stated in writing the grounds of his decision, as follows:—

“ The provisions of the statute of the 10 G. 4. c. 50. do not, in my opinion, at all affect the question in this case. That statute was passed, not for the purpose of altering the process in suits against peers or members of the House of Commons, but, simply, to remove altogether those impediments to the progress of those suits which had been before partially relaxed by the statutes 12 & 13 W. 3. c. 3., and 11 G. 2. c. 24.; and by reference to the terms of the former of these statutes, it was obviously no part of the intention of the legislature to authorise the issuing of a *capias* against either a peer or any person having privilege of parliament. The question, therefore, appears to me to be left untouched by those statutes. By the express provisions of the statute 2 & 3 W. 4. c. 39. s. 19., no person is subject to outlawry under that act who was before that act exempt therefrom by reason of his privilege. Now a *capias ad satisfaciendum* could only be issued in cases where a *capias* might have been issued on the original process in the suit. But a *capias* could not have been issued at the commencement of the suit against a person having privilege of parliament. So neither can it be, in execution; and the process of outlawry after judgment being founded upon the *ca. sa.*, and being itself the foundation of the *capias utlagatum*, could not regularly be had against a member of parliament.

“ I am, therefore, of opinion that the proceedings should be set aside.

“ 29th June 1840.

T. Erskine.”

This order was subsequently made a rule of court.

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Nov. 13.

Upon an affidavit stating the same facts which were before *Erskine J.* at chambers,

Spankie Serjt. moved for a rule, calling upon the defendant to shew cause, why the order of Mr. Justice

Erskine should not be set aside (a), and why the defendant should not pay to the plaintiff the costs of the application.

It is submitted that it was competent to the plaintiff to arm himself for future hostilities, by proceeding in the usual way to outlawry, and that a serious mistake has been made in interrupting that proceeding. The personal liberty of the defendant has been subjected to no attack; and the circumstance of his being entitled to privilege from arrest, forms, therefore, no objection to the regularity of the proceedings. It is said in the books that a *capias* will not lie against a member of parliament; but the true meaning of that *dictum* is, that he cannot be taken upon a *capias*. [*Tindal* C. J. There seems to be an anomaly in asking the court to issue a writ which, it is known, cannot be enforced.] It is submitted, that the court cannot know that the writ will not be enforced, until something is done upon it. When the writ issues the court is not apprized that the defendant is a member of parliament. Whether the party against whom process has been awarded is privileged from arrest, is a matter to be ascertained by the sheriff when the writ shall come to his hands. (b) Here, the writ was issued for the purpose of being returned *non est inventus*. (c) Though

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(a) The rule, as drawn up, appears to have been irregular in praying that an order, which had been made a rule of court, should be set aside, without also praying that the rule itself might be discharged. It may be observed further, that the making of the present rule absolute in the form prayed, would have left the former rule, and the order for setting aside the proceedings as embodied in that rule, untouched.

(b) The sheriff is not bound to take notice of the privilege of an attorney: *Duncombe v.*

Church, 1 *Salk.* 1.; and see *Co. Litt.* 131. In *Tarlton v. Fisher*, 2 *Dougl.* 677., *Buller* J. says, "If he arrest a peer, the writ is erroneous, but he is not a trespasser for executing it." And see *Cameron v. Lightfoot*, 2 *W. Bla.* 1190.

(c) This return in its *Eng. lish* form, "the defendant is not found;" has introduced some confusion. It has been supposed to mean that upon search being made "the defendant is not to be found." *Watson on Sheriffs, Appendix*, c. 6. s. 3. p. 370.; *Rex v. The Sheriff of*

1841. it would have been culpable to execute the writ according to the mandate it contains, it is submitted that the writ itself, was regular. [Coltman J. But the return of *non est inventus* would be false (a).] It might be so; but that would be the result of subsequent inquiry.

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At an early period of our history, strenuous efforts were made on the part of the Commons to protect their members from even the *service* of any process at law or in equity during the time of privilege; and the court will remember the case of Mr. Serjt. Pemberton, who was seized, *vi et armis*, by order of the Speaker of the House of Commons. (b) Such proceedings being at length con-

Kent, 2 M. & W. 316., 5 Dowl. P. C. 451. *Inveniri* appears to be merely the French "*se trouver*;" transformed into what may be called a Latin middle verb. This form of expression was, no doubt, introduced into the former language by the *Franks*, from their own *Teutonic* "*sich befinden*." Both, like the Spanish "*estar*," mean simply—to be, at the time predicated, in the locality, or the circumstances, predicated.

(a) *Vide Forsyth v. Marriott*, 1 N. R. 251.; *Burks v. Mayne*, 16 East, 2.; *Ward v. Brumfit*, 2 M. & S. 238.; *Johnson v. Driver*, 1 Dowl. P. C. 127.; *James v. Jenkins*, 9 Moore, 589.; *Jenkins v. Bidulph*, 4 Bingh. 160., 12 Moore, 390.; *Sillitoe v. Wallace*, *Tidd's Practice*, 1147., 9th ed.

In 6 Edward I. several outlawries were revoked (as for error in fact), because the defendants had lands in the county, though the sheriff fraudulently returned *quod non sunt inventi, nec aliquod habuerunt*, 1 Roll. Abr. 804, 805.; 22 Vin.

Abr. 322. pl. 7. *Vide post*, 452. (b).

(b) *Jay v. Topham*, 12 Howell's State Tri. 822.; 8 Hargr. St. Tr. 1.; 10 Commons' Journ. 164. 209, 210. 213. 227.

The offence for which Sir Francis Pemberton was proceeded against, was, over-ruling the plea of the Serjeant-at-arms to the jurisdiction, in *Jay v. Topham*; as to which, Lord Ellenborough in *Burdett v. Abbott*, 14 East, 104. is reported to have said, "It is surprising, upon looking at the record in that case, how a judge should have been questioned, and committed to prison by the House of Commons, for having given a judgment, which no judge, who ever sat in his place, could differ from. The plea there began as a plea in bar, and concluded in abatement. There was a special demurrer, too, alleging for cause, that the plea did not answer the whole matter of the declaration. I do not see how any judge, sitting in judgment upon a record so framed, could possibly have given any other judgment

sidered gross and outrageous, a stop was put to them by an act passed in the reign of *William III.*, which, whilst

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than the court gave in that case." Notwithstanding the strong language here used, it will be seen, upon referring to the record in *Jay v. Topham*, which is set out in the two preceding pages (14 *East*, 102, 103.), that the plea, instead of beginning in bar, commences thus: "*Et prædictus Johannes Topham, per R. G. attornatum suum, venit et defendit vim et injuriam, et dicit,*" &c., purposely omitting the words *quando, etc.*, which would have given it the appearance of a plea in bar, though it was well settled, both before and after *Jay v. Topham*, that in a plea in abatement, the defendant may even defend the force and injury, *when, &c.*; and that the words *when, &c.* shall be considered as only half defence, if the defendant go on to plead *to the jurisdiction*, *Litt. s. 195., Co. Litt. 127. b.; Alexander v. Mawman, Willes, 40.; Wilkes v. Williams, 8 T. R. 631.; 2 Wms. Saund. 209. b, c.*

With respect to the charge, that the plea did not answer the whole declaration, which alleged a detention *quousque*, the case stands thus: The declaration states a trespass, assault, and imprisonment, and alleges that *Topham detained Jay in prison ten days, until he paid 30l. for his liberation.* *Topham* having answered the trespass, assault, and imprisonment, was not bound to answer the detention, which was merely matter of aggravation, unless new-assigned; *Taylor v. Cole, 3 T. R. 292.; 1 Wms. Saund. 28. a.*

What makes this charge the more extraordinary, is, that the plea expressly states that *Topham, cepit et detinuit Jay, ad adducendum ad barram, &c.*: adding, "*Quæ quidem captio et detentio, ex causâ prædictâ, est eadem,*" &c. 14 *East*, 102. n.

Neither Sir *F. Pemberton*, nor Sir *Thomas Jones*, when called to account by the House of Commons for pronouncing a judgment by which their privileges were supposed to be invaded, sought to avail himself of those supposed defects in pleading, which, according to Lord *Ellenborough*, would have so completely exonerated them; neither can it be supposed that the displeasure of the House was caused by its being dissatisfied with any decision of the court of King's Bench upon questions raised as to the proper commencement of a plea in abatement, or as to the least artificial mode of dealing with a *quousque*.

Jay v. Topham, was not relied on by the counsel for the defendant, in *Burdett v. Abbott*; and Lord *Ellenborough*, whose attention was called but slightly to this case, perhaps looked no further than the two causes of demurrer assigned, taking it for granted (as appears to have been done by *Campbell, A. G.* in *Stockdale v. Hansard, Proceedings, &c. 23. 74.*) that no such assignments would have been made, had they not been borne out by the state of the record. And see *Verdon v. Topham, Sir T. Jones, 208., 2 Nels. Abr. 1248.*

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it (a) secured (b) the *persons* of members from being subjected to any arrest or imprisonment, at the same time, provided that actions, &c. might at any time be brought against any peer or member of parliament, their servants, or any other person entitled to privilege of parliament; which actions, &c. were not to be impeached or delayed by pretence of any such privilege. The first section of that act empowered certain courts, after a dissolution, prorogation, or adjournment, to proceed to give judgment, &c., “any privilege of parliament to the contrary notwithstanding.” The act, however, provided, that no proceeding should subject any knight, citizen, or burgess “to be arrested during the time of privilege.” But it was never intended that the subject should be restricted from laying the foundation for proceeding to judgment when the time of privilege should have expired. As soon as the forty days given by the franking acts (c) were over, any member of parliament could be made answerable, by proceedings which had been preparing in anticipation of the time when the period of his privilege should have run out. These provisions were further extended by subsequent statutes. The nature of the protection is shewn still more clearly by 10 G. 3. c. 50., which leaves all proceedings open which do not terminate in an

In an action against *Topham's* servants, it was pleaded *in bar*, that the House of Commons had ordered *Verdon* to be sent for in the custody of the serjeant-at-arms, to answer *pro notoriâ violatione privilegiorum per ipsum commissâ contra Dom. Com.*; the plea being signed “J. Holt.” A verdict was found for the plaintiff, upon an issue taken in the rejoinder upon an allegation of notice of a dissolution; *Verdon v. Deacle*, 2 *Show.* 300. And see the record at length, with

the bill of exceptions, signed by *Wyndham J.* at the *Cambridge assizes* of *March 14/24, 1681/2*. *Brownlow, latinè redivivus* 129.

(a) 12 & 13 W. 3. c. 3.

(b) The act gave no new security. It saved part of an existing privilege, the rest of which, the altered state of society had rendered it unnecessary to retain.

(c) 4 G. 3. c. 24., 24 G. 3. c. 37.; and see 35 H. 8. c. 11.; and the *Irish* statute of 3 Ed. 4. c. 1. See also *Earl of Athole v. Earl of Derby*, 2 *Lev.* 72.

arrest of the member during the period of privilege. The second section of that act provides, "that any person may at any time commence and prosecute any suit in any court against any of the knights, &c., or against any of their menial servants, and no such action, suit, or process or proceeding thereon, shall at any time be delayed by, or under colour or pretence of, any privilege of parliament; provided that nothing in this act shall extend to subject the *person* of any knight, &c., for the time being, to be arrested or imprisoned upon any such suit or proceeding." Therefore the only saving was, that there should be no arrest. It is admitted that under these proceedings a member of parliament could not be arrested or imprisoned, or molested in his person; but it is contended that all may be prepared and be in readiness, so that the person may be arrested when the time of privilege shall have terminated. The authorities shew that in all cases it is not the process that has been considered irregular, but the execution; and the House of Commons, in the height of its late excitement (*a*), never considered the *writ* illegal, but simply the execution. At the time when the right of issuing process against members of parliament was not in litigation, a contrary doctrine was never held. *Sir George Benyon v. Sir John Evelyn* (*b*) was an action on a promise made in 1645; to which the defendant pleaded the statute of limitations. (*c*) To that the plaintiff replied, that the defendant was a member of the House of Commons till 1648 (*d*), and that then the government was

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(*a*) See *Proceedings in Stockdale v. Hansard*, published by order of the House; less fully reported as to the argument, 9 *A. & E.* 1., 2 *P. & D.* 1. See also *Lord Campbell's Speeches*, 136.

(*b*) *Sir Orlando Bridgman's Judgments*, 324., also cited in 12 *Mod.* 64., *Carthew*, 137., 14 *East*, 18. 49. 88.

(*c*) 21 *Jac.* 1. c. 16. (1623).

(*d*) *i. e.* 30 January — 9 February 1648-9, on which day the legal existence of the parliament (the long parliament which the king had, by 16 *Car.* 1. c. 7., renounced the power to dissolve), was considered as determined by the death of the king.

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usurped, and no courts erected, and that he brought this action as soon as courts were erected upon the king's restoration. It was then decided that the privilege of parliament, and the circumstance of the courts not being open, were no answer to the statute of limitations, not being within any of the exceptions out of the statute (a), and that a man might file an original against a member of parliament without breach of privilege, and continue it till his privilege be terminated. (b) *Rivers v. Couzen* (c) is also an authority to shew that the issuing of process is not unlawful, but that any molestation of the person would be wrong. In *Colonel Pitt's* case (d), parliament was prorogued on the 16th of the month, and dissolved on the 17th. The new writs bore teste the 18th, and the defendant, who was a member of parliament, was arrested on the 20th. The question was, whether the arrest had been made within time of privilege; and it was determined that it had been so made, and that the prisoner might be discharged on motion. [*Coltman J.*

(a) If the statutory period once begins to run, it is not stopped by any subsequent disability. Thus, if a man become insane the day after a cause of action has accrued to him, and of which he could by no possibility have notice, or if he is sailing out of the *Thames* when a right accrues to him at *Berwick-upon-Tweed*, the six years still continue to run; unlike the more equitable disposition of the civil law (partially adopted by 3 & 4 W. 4. c. 27.), *contra non valentem agere non currit præscriptio*. By the third section of 12 & 13 W. 3. c. 3., however, it is provided "that where any plaintiff shall, by reason or occasion of privilege of parliament, be stayed or prevented from prosecuting any suit by him commenced,

such plaintiff shall not be barred by any statute of limitation, or nonsuited, dismissed, or his suit discontinued, for want of prosecuting of the suit by him begun; but shall, from time to time, upon the rising of the parliament, be at liberty to proceed to judgment and execution." A similar provision is contained in 11 G. 2. c. 24. s. 3.

(b) Since the 12 & 13 W. 3. c. 3., no continuance would appear to be necessary.

(c) 5 *Bac. Abr.* 5th & 6th ed., 628.; 1 *Hats.* 42.; 14 *East*, 36.; *Proceedings in Stockdale v. Hansard*, 85.

(d) *Holiday v. Pitt*, 2 *Str.* 985. *Cas. temp. Hardw.* 28. 37. *Fortescue*, 342. 159. 2 *Comyns's Rep.* 444.

Was the motion to set aside the writ?] It was to discharge him, and Lord *Hardwicke* C. J., with a majority of all the judges, did discharge Colonel *Pitt* on account of the arrest being illegal. [*Maule* J. Is there any instance of a writ of privilege and judgment upon it? That would shew whether the writ of *capias* was held void, or whether there was only a discharge from the arrest.] It is believed that no such entries are to be found. [*Tindal* C. J. There does not appear to have been any case in which a member of parliament or a peer has been put to his writ of privilege.] Lord *Hardwicke* C. J., in the case cited from *Strange*, said, that since the statute of 12 and 13 *W. 3.*, process was lawful, but that arrest was illegal. It was there decided that the irregularity was merely in the execution of the writ. [*Tindal* C. J. In *Tidd's Practical Forms*(a), a form is given of a writ of privilege to an inferior court for an attorney of K. B., to this effect: "We command you and every of you that you desist from taking the said *A. B.* into your custody upon any writ or writs, &c., and that if the said *A. B.* be detained in your custody by any writ, &c., that then you discharge the said *A. B.* out of your custody." Such writ is similar to a parliamentary writ of privilege. (b)] The uniformity of process act (c) authorised the issuing of a *capias* (d), but left the law as it relates to the question, whether it was unlawful to proceed to outlawry when no molestation of the person took place, in the state in which it was before.

On these grounds it is conceived to be perfectly clear, that there being nothing to shew that proceedings may not be taken, so long as the *person* is not arrested, the process of outlawry was not irregular, though the execution of it would have been so. Creditors may pro-

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(a) 6th ed., 16. In the 8th ed. this form is omitted.

(b) *Post*, 474.

(c) *Post*, 463.

(d) But see 1 & 2 *Vict.* c. 110.

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ceed by all means in their power to make a member pay his debts, so long as they do not molest his person. They are entitled to be armed with all the means that may enable them to recover their debts when privilege shall cease. There was no irregularity in the outlawry itself, and the plaintiff must proceed to act upon it before the defendant can claim the interference of the court. While he is a member of parliament, the remedy is suspended as to his person; but it is only his person that was protected. The object of the present application is, to have an important question decided; and it is submitted that this is a case fit to be reconsidered. The court having granted a rule nisi,

Bompas Serjt. now shewed cause. When a *ca. sa.* issues, the sheriff will be perfectly justified in executing the mandate of the court according to its tenor. He is not bound to take notice of any privilege to which the party against whom the writ issues, may be entitled. (a) Neither was he bound here to act upon the request, which accompanied the delivery of the writ, that *non est inventus* (b) should be returned. The next process is a writ of *exigi facias*, under which the defendant is demanded at successive courts. It is admitted that the defendant could not be taken upon any writ; yet for not surrendering himself,—for not coming to be taken,—it is contended that he may be punished by outlawry,—by the forfeiture of his goods and of the issues of his lands. Before the statute of 12 & 13 W. 3. c. 3. the privilege claimed was, not protection for the person, but exemption from liability to be sued. (c) The

(a) *Vide Cameron v. Lightfoot*, 2 W. Bla. 1190.

(b) *Vide supra*, 439. (b).

(c) It would have been a breach of privilege before the statute to *summon* a peer or

member, but *quære* whether the issuing of an original writ, or of other *serviceable* process, without actually serving it, could have interfered with the discharge of parliamentary duties.

claim was supported on the ground that persons engaged in the performance of a great public service ought not to have their attention drawn off to matters of a private (*a*) and personal nature; and no litigation, either at law or in equity (*b*) could be commenced or prosecuted against a peer or a member of the House of Commons during the sitting of parliament. [*Erskine J.* Or for forty days after a dissolution. (*c*)] By the 12 & 13 *W. 3. c. 5.* the general exemption is taken away, but the second section expressly provides that members shall not be arrested or imprisoned. So the 13 *Anne c. 18.*, enacts that nothing contained therein shall subject a peer or a member of parliament to be *arrested*.

(*a*) Even now a member cannot absent himself for the purpose of attending to his own affairs, however pressing, without the leave of the House.

(*b*) Or in the ecclesiastical court. In the 18 *Edw. I.* (1290), an attachment issued against the Prior of the Holy Trinity, and *Bogo de Clare*, to answer the King, *Peter de Chaunot*, the king's steward, *Walter de Fanecurt*, the king's marshal, *Edmund Earl of Cornwall*, and the Abbot of *Westminster*, for serving the earl with a summons to appear before the Archbishop of *Canterbury*, while the earl was walking up *Westminster Hall* on his way to the parliament. *Bogo de Clare*, the plaintiff in the court Christian, paid a fine to the King, and offered the earl 1000*l.*, of which the latter remitted all but 100*l.* 1 *Rot. Parl.* 17 *a.*, *b.* *Ryl. Plac. Parl.* 6.

Prynne (4th Reg. 819.), denies that this was a case of privilege, *Bogo* being sued not only by the earl, but also by the king,

whose palace, and by the abbot, whose sanctuary was violated.

It appears, that when an attempt was made to serve *Bogo de Clare* himself with a similar process, his servants compelled the apparitor to eat (*manducare fecerunt*) the citation. *Ib.* 24. *b.*, *Abbreviatio Placitorum*, 288. Four of *Bogo's* servants, whom the apparitor was able to identify as having taken an active part in this outrage, escaped beyond sea; but *de Clare* himself, notwithstanding his absence at the time, and his disclaimer of all participation in the transaction, and of all privacy with its perpetrators, was ultimately held to be personally responsible. *Ryl. Plac. Parl.* 22.

What is particularly observable in this affair is that *Bogo* was fined by the court of parliament as for a breach of privilege, in permitting the archbishop's officer to be insulted, and the archbishop's process treated with contempt, during the sitting of parliament.

(*c*) *Vide antè*, 442.

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The same principle pervades the provisions of 11 G. 2. c. 24. The 10 G. 3. c. 50. reenacts the clauses contained in the preceding statutes which preserve the privileges of parliament, and contemplates that the proceedings will be, not by *capias ad respondendum*, but by summons and distress infinite. (a) There is no statute which authorises the issuing of process by which the arrest of a member is, even formally, commanded. (b) The arrest of a member of parliament being illegal, it cannot be legal for the court to order such an arrest. The judgment in *Holiday v. Pitt* (c) was referred to in moving for the rule, as shewing that the privilege is confined to the protection of the person from *actual* arrest. But the court could not in that case grant more than was asked for by the rule. The member is protected not only from being arrested, but from being made the subject of a command to arrest. *Hat-*

(a) Altered by the uniformity of process act, *post*, 463.

(b) It is said in *Bacon's Abr. Privilege* (C.) 7., 5th and 6th ed. vol. v. 645., that "a member of the House of Commons may be sued, either in K.B. or Chancery, by bill; but he cannot be declared against, in K.B., as in the custody of the marshal." The cases cited in the margin, *Dawkins v. Burridge*, 2 Stra. 734., 2 Lord Raym. 1442.; *Say v. Lord Byron*, Sayer 63, 64., 2 Cowp. 845., 2 H. Bla. 302., are silent as to the latter part of the proposition; and in *Wandsworth v. Hande-* side, *Bac. Abr. Priv.* (C.) 7., it is said, "It hath been held, that in an action founded on 12 & 13 W. 3. c. 13. (c. 3.), the defendant shall have an imparlance; and it was said in this case, that the practice is to file

a bill in the nature of a special *capias* against the defendant, and then to summon him; and if he appear upon such summons, the plaintiff may declare against him as in *custodiâ marescalli*." In the same work (*Bac. Abr. Privilege* (C.) 7., 5th and 6th ed. vol. v. 643.), it is said, that if a peer fails to appear in Chancery after receiving a letter summons from the Chancellor, "a *subpœna* issues against him; and his time for appearing and answering being out, an *attachment* must be actually made and entered against him, though never executed, to ground a sequestration upon. It is a motion, of course, for a sequestration upon an attachment for want of an answer." But see *Bac. Abr. Privilege* (C.) 7., 5th and 6th ed., vol. v., 642.

(c) *Suprà*, 444,

sell (a) refers to the case of *Hodges* and *Moore* reported by *Prynne*. (b) “*Moore* having privilege of parliament procures the Speaker, Sir *H. Finch*, to write his letter in the name of the parliament to the court of King’s Bench to stay judgment. The court was greatly offended at this, and would have returned a sharp answer to the parliament, if it had not been dissolved. Because it is against the oaths of the judges to stay judgment *nec per grand seal nec per petit seal, per le statute*. (c) But the way in such case is, to procure a *supersedeas* (d): which is a special writ appointed in these cases; and this is to be allowed, being the legal course; but the latter is not to be regarded. And in another report of this case, the effect of this letter was disallowed by the whole court, and the court said the defendant ought to have brought a writ of privilege; and when *Thorpe*, who was speaker had a *supersedeas* for *all* actions; this was bad; for he ought to have had a particular *supersedeas* for each action. (e) And the parliament had privilege for the person, but not for the proceedings by any letter. Lord Chief Justice *Crewe* (who had been himself speaker), said ‘*Que il voet estoyer sur le justice del court: Et si, come ils estoyent sur leur privileges, issint nous voylomis; en ascun cases poent ils restreyn le counsel del party, ou le party luy mesmes, mes nemy le court, que n’est lye de prender notice sans special breve; mes les partyes, queux prosecute, sont en danger.*’ (g) This case

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(a) *Hatsell’s Prec.* 1st ed. 179., 2d. ed. 184.

(b) *Hodges v. Moore*, 1 *Car. I.*, *Prynne’s* 4th Register, 810.

(c) See *Abbrev. Placit.* 329.; *Abbr. Rot. in Scacc.* 446. b.; *Serviens ad legem*, 90. 212.

(d) See a *supersedeas* to an exigent against a prior, *Rast. Entries*, 336. c.; against a baron, *post*, 472. (a).

(e) As to *Thorpe’s* case, see 5 *Rot. Parl.* 239., 1 *Hatsell*, 28., 13 *Co. Rep.* 64.; *Proc. in Stockdale v. Hansard*, 45.

(g) “That he would stand upon the justice of the court. And so as they stand upon their privilege, so will we. In some cases they can restrain the counsel of the party, or the party himself, but not the

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is reported in *Latch* (p. 15. 48. and 150.), and in *Noy* there is a very short note of it (p. 83.) It appears upon the Journals of the 20th of *May* 1626, and it is referred to the select committee, to whom Sir *Robert Howard's* case had been referred. This committee make no report; and the parliament is dissolved upon the 15th of *June*. If the judges had continued of the same mind, which the reporter *Latch* says they were, "to have written a sharp answer to the parliament," it is probable that the House of Commons, which had compelled the High Commission Court "to vacate and annihilate" all their proceedings against Sir *Robert Howard* when in breach of their privilege, (proceedings subscribed by the Lord Archbishop of *Canterbury*, Lord Keeper, Lord President, Lord *Lincoln*, and several others,) would not have quietly acquiesced in this disobedience of the court of King's Bench, to an order which, from the beginning of the century, had been sent to all the courts of *Westminster Hall*, and, as far as appears, had been always attended to."

It is clear, that before the 12 & 13 *W. 3. c. 3.*, the issuing of a *capias* against a member of parliament would have been illegal. (a) In the *Countess of Huntingdon's* case (b), a bill of *Middlesex*, which had issued, was superseded, and the defendant was discharged without pleading, it appearing by the record that the defendant was a peeress, and the attorney who had issued the process was committed; in *Fortnam v. Lord Rokeby* (c), a peer of *Ireland* having, subsequently to the Union (d), been

court, which is not bound to take notice without a special writ. *But the parties who prosecute are in danger."*

(a) *Vide Lady Wake v. The Bishop of Ely*, T. 29 E. 3. fo. 42. and see 1 *Mann. & Ryl.* 112. (a)

(b) *Anon.* 1 *Ventr.* 298. And

see *Couche v. Lord Arundel*, 3 *East*, 127.

(c) 4 *Taunt.* 668.

(d) By 40 *G. 3. c. 67. art.* 4., it is enacted, "that all peerages, both of *Great Britain* and *Ireland*, now existing or hereafter to be created, shall,

served with the copy of a common *capias ad respondendum*, the proceedings were set aside as irregular. (a) That was a stronger case than the present, because, as there was no affidavit to hold to bail, no arrest could have been made under the *capias*. In *Briscoe v. The Earl of Egremont* (b), where an *English* peer had been served with the copy of a bill of *Middlesex*, the proceedings were set aside because it contained a *capias* clause. [Spankie Serjt. A peer, I admit, is not subject to process of *capias*, on the ground of his presumed sufficiency. (c)] The plaintiff then admits himself out of court, the privilege of the peers being precisely the same as that of the member of the House of Commons, the obligation to give his attendance in parliament being the ground of exemption in each. Suppose the return had been, that the defendant was privileged from arrest instead of *non est inventus*, the defendant could not have been outlawed. *James v. Jenkins* (d) shews that a

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in all other respects, be considered as peerages of the United Kingdom; and that the peers of *Ireland* shall, as peers of the United Kingdom, be sued and tried as peers, except as aforesaid, and shall enjoy all privileges of peers, as fully as the peers of *Great Britain*; the right and privilege of sitting in the House of Lords, and the privileges depending thereon, and the right of sitting on the trial of peers, only excepted."

(a) *S. P. Coates v. Lord Hawarden*, 7 B. & C. 388., 1 M. & R. 110; *Storey v. Birmingham*, 1 M. & R. 111. n.

(b) 3 M. & S. 88. But as to this case, see *Davis v. Lord Rendlesham*, 7 Taunt. 679. S. C. not S. P. 1 B. Moore, 410.

(c) In a *homine replegiando* against Lady Spenser and others,

it was said by *Hulse*, (*Hugh Hulse J. of K. B. ut videtur*,) that "in a writ of debt and trespass, a *capias* does not lie against an earl, baron, *et hujusmodi*, because that, by reason of their estate, it is intended that they have assets whereby they can be brought in by process (*vide ante*, 440 n.); but in this case, of a wrong which she has done in not suffering replevin to be made, it is a cause that her body should be taken." *M. 11 H. 4, fo. 15, pl. 34.*

In that case it was pleaded that Lady Spenser was a peer.

(d) 9 B. Moore, 589. And see *Pigou v. Drummond*, 1 New Cases, 354., 1 Scott, 264.; *Drummond v. Pigou*, 2 New Cases, 114., 2 Scott, 228.; *Anderdon v. Alexander*, 2 Dougl. P. C. 267., *infra*, 454.

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plaintiff can proceed to outlaw the defendant in those cases only where the defendant absconds and cannot be found. It also shews, that it is illegal to proceed to outlawry against a person who is known to be already in custody; inasmuch as by such process the defendant is supposed to have been guilty of a default in not surrendering himself into custody.

Spankie Serjt. in support of the rule. The intention of the legislature in framing the different statutes which have been referred to, was, to protect the *persons* of members of parliament from arrest and imprisonment. Members have no privilege against being outlawed. (a) The case of peers, who are privileged for life, is different from that of members of the House of Commons. Peers are intended to have sufficient (b) to pay whatever debts they have contracted: *Bac. Abr. Privilege* (C 1.) The contest between the public (c) and the House of Commons was decided by the 12 & 13 W. 3. c. 3., which

(a) It is said by the reporter, in the *Year Book* of M. 27 H. 8. fo. 22., to have been decided in the reign of Edward III. that *exigent* lies against a lord of parliament, if he be not *certified* lord of parliament; but the authorities which he vouches he does not refer to as cases in the printed *Year Books*, nor are they to be found there. The same position is stated in *Bro. Abr. Exigent*, pl. 3., but citing only 27 H. 8. 22. As to certifying or recording a baron, see *post.* 474., *Reg. Brev.* 287 b.

(b) Lord Brooke says (*Bro. Abr. Exigent*, pl. 72.). "See in the Old *Natura Brevium*, in the writ of debt, that process of outlawry does not lie against archbishop, earl, abbot, baron, or knight; for it is

intended they are sufficient. That, however, does not hold good (*ne tient lieu*) of knights at this day, for knights are often outlawed. But if a lord of parliament be outlawed, it is error, *ut tenetur*; but I have heard that denied by old cursitors." It is said, 14 H. 6, fo. 2, pl. 9., "Process of outlawry does not lie against a duke, earl, or baron, not only because it is intended that they have lands (*antè*, 440 (a)), but for the dignity which is in them."

(c) This would be that part of the public which adhered to the Duke of York and his friends, (by whom *Jay* was supported against an ultra-protestant House of Commons,)—the jacobites and nonjurors of the succeeding half century.

put an end to the claim set up by the commons to be exempted from all liability to be *sued* during the time of privilege (a), a claim which the House of Lords never set up. (b) Yet the privilege of peers is permanent; that of the commons temporary.

(a) By the statute of *William* which authorised the commencing and prosecuting of actions against peers and members of parliament in the superior courts at *Westminster*, and in the duchy, admiralty, and ecclesiastical courts, both Houses relinquished the *right*, which they had long enjoyed, of exemption from the service of process during the time of privilege.

(b) *Sed vide post*, 462 (a). 470 (a).

In Lord *Sturton* (*Stourton*) and Lord *Mordant's* case in the Star Chamber, 3d June 1606, (Sir *F. Moore*, 780.), when those peers were fined, the former in 6000 marks (4000*l.*), and the latter in 10,000 (6666*l.* 13*s.* 4*d.*), and remanded to the Tower during the king's pleasure, for not attending, according to their writs of summons, on the first day of the parliament, (the 5th of *November*, of the gunpowder plot, to which they were suspected of being privy) amongst the four ways (*voyces*, no doubt misprinted for "*voyes*") of aggravation urged by the Attorney-General (Sir *Edward Coke*), the third was, "the frivolousness of their excuses. *Sturton* says that he was indebted 130*l.*, and durst not come (*ne ausust de vener*), to parliament; and yet he was (taken) while coming (*et fuit en veignant*), on the 6th, which was the day after the danger intended, (or understood, *le jour apres le danger entend.*)"

"The persons present on that occasion (*la presence de ceo*), were Sir *J. Herbert*, Sir *J. Fortescue*, *Walmsley*, *Flemming*, and *Popham*; of the earls, *Dorset*, *Nottingham*, *Suffolk*, *Shrewsbury*, *Worcester*, *Northampton*, *Salisbury*, and *Exeter*; of the bishops, *Canterbury* and *London*; and Lord *Ellesmere*, Chancellor." And see *Dyer*, 60. *marg.*

The liability to amercement and other punishment in such cases is recognised by 5 *Rich. 2. st. 2. c. 4.*

No objection seems to have been taken by these peers to the right of the Star Chamber to inquire of matters done or omitted to be done in parliament. See the *Bishop of Winchester's Case*, 4 *Inst.* 15., 12 *Howell's St. Tri.* 1435., where, to a similar proceeding in K. B., the defendant pleaded to the jurisdiction. It is not improbable that these noblemen had too distinct a recollection of the fate of the Duke of *Norfolk* in 1571, and of the more recent execution of the Earl of *Essex* in 1601, to be anxious to dispute the jurisdiction of a court in which, at least, their heads were safe.

When Lord *Sturton* and Lord *Mordant's* case occurred, it was probably considered doubtful whether the privilege of peers summoned to parliament arose before the day on which the parliament sat; as it was afterwards considered necessary

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It may be admitted that a *capias utlagatum* cannot issue against a member during the period of privilege. [Maule J. Do you mean that it cannot issue, or that it cannot be executed?] It may issue, but cannot be executed. The object of the present proceeding is merely to enforce payment of a debt. It is the issuing of a *capias* against a party only temporarily privileged, with a view to its being enforced after the privilege shall have ceased. The decision in *James v. Jenkins* (a) has not been acted upon; *Johnson v. Driver*. (b) *Pigou v. Drummond* (c) was a case of particular hardship, as the party proceeded against to outlawry was known not only to be abroad, but to be represented by an attorney in this country, to whom no application had been made. Here, there is nothing more than a *bonâ fide* intention to outlaw a party against whom no other proceedings can be made available. All that the House ever did was to discharge the party; they never interfered to set aside the proceedings. [Bosanquet J. They could not set aside the proceedings; they could deal only with the effect of the proceedings.] In *Attwyl's* case (d), where a *fi. fa.* or a *ca. sa.* had been sued out against a member of parliament in the Exchequer, a special act of parliament was resorted to (e), which act

by the House of Lords to make orders, (28th May 1624, and 16th January 1628,) by which it is declared that the privilege commences from the date of the writ of summons. And see the *Prior of Malton's Case*, 1 Hatsell, 12., *Proceedings in Stockdale v. Hansard*, 84.; *Donne v. Walsh*, 1 Hatsell, 41., *Proceedings in Stockdale v. Hansard*, 84.; *post*, 470 (a).

(a) *Suprà*, 451.

(b) 1 Dowl. P. C. 126.

(c) 1 New Cases, 354. But

see *Hunter v. Whitfield*, 6 Dowl-
 ing, P. C. 70.

(d) 1 Hatsell, 48. *Proceed.*
in Stockdale v. Hansard, 83.

(e) This legislation for particular cases appears to have been in conformity with the practice of the times. At a period when the legislative duties of parliament were less onerous than they now are, the Houses seem to have been not unwilling to fill up their intervals of leisure which occurred during the discussion of the

authorised the plaintiff to proceed against the defendant after the dissolution. [*Erskine J.* There the plaintiff was allowed to proceed upon the same judgment, not

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amount of subsidy to be granted, or of the lists of political opponents to be attainted, by legislating on subjects which, in later times, would have been left to the ordinary jurisprudence of the country. Besides which, as the law then stood, where the body was once taken in execution the debt was generally considered as extinguished, unless the debtor escaped from prison without the assent of the creditor. But a discharge out of custody by lawful authority, as by order of the House of Commons, might have operated as an extinguishment of the debt. Unless, therefore, this rule of the common law, under which the debt was considered to be discharged, had been suspended,—which could only be by an act of the legislature,—the creditor would have been in danger of losing his whole debt by what might have been a mere inadvertence.

Neither of the above reasons has any application to the 3 & 4 *Vict. c. 9.*, by which provision is made for the staying of proceedings, criminal or civil, against persons employed by, or acting under, the authority of the Houses of Parliament, or one of them, in the publication of such of the reports, papers, votes, or proceedings of either House of Parliament, as such house may determine fit or necessary to be published. This latter statute, notwithstanding the plausible state-

ments with which the bill was introduced, the guarded language in which the enactments are expressed, and the saving of parliamentary privilege contained in the fourth section, can scarcely be regarded in any other light than that of a concession (which may be hereafter regarded as an absolute surrender) to popular feeling of the privileges, and even of some of the most important functions, of the House of Commons. To the want of sufficient firmness on the part of the House to assert its own powers, and to the imitation of the precedent of 1814, when an unpopular House of Commons put forward a court of law to vindicate those rights which their constituents, the commons of *England*, had placed in their keeping,—instead of proceeding, as former parliaments had done, and as all other courts have constantly done, directly against the impugnors of those rights,—the difficulties which led to the above enactment may fairly be ascribed.

That the strenuous opposition displayed upon the occasion in question by the city of *London* was caused rather by the mistake of placing the privileges of the House in such a position as to give to the discussion the appearance of an ordinary legal proceeding in a court of competent jurisdiction, than by any dissatisfaction with the course taken by the House with respect to the publication of parlia-

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upon the same execution.] The statute of 2 Jac. 1. c. 13., after reciting that “doubt hath been made, if any person, being arrested in execution, and, by privilege of

mentary papers, may be inferred from the circumstance that the citizens, after voting a present of plate to their mayor in 1771, for supporting the right to the unrestrained publication of all parliamentary proceedings without the consent of the House, with a singular impartiality, bestowed a similar mark of approbation upon their sheriffs in 1840, for resisting the exercise of such a right of publication, even *with* that consent. The resistance offered by the city of *London* was, however, no doubt encouraged by the re-appearance in *Westminster Hall* of that low estimate of parliamentary duties, that unfavourable view of parliamentary rights, and that jealousy of parliamentary privilege, once entertained by Lord *Holt*, but generally supposed to have been buried with other opinions peculiar to that learned but eccentric judge, so unfortunate where he differed from his brethren on the bench (*vide Shuttleworth v. Garnet*, or *Garrett*, 3 Lev. 261., 3 Mod. 240. *Comberbach*, 151., 1 Show. 35.; *Lane v. Cotton*, 1 Ld. Raym. 546., 5 Mod. 456., 11 Mod. 12., 12 Mod. 472., *Carth.* 487.; *Cole v. Rawlinson*, 1 Salk. 234., 2 Ld. Raym. 831.; *Morris v. Reynolds*, *ib.* 857., *Regina v. Paty*, *ib.* 1105.), and whose opinions may have received a bias from his ill success in defending the servants of the serjeant-at-arms; *antè*, 442. n.

That the enactment in question should be hailed with satisfaction by those who were desirous of destroying or new modelling the *British* constitution, will not be matter of surprise, when the state of parliamentary privilege, as it existed before the 3 & 4 Vict. c. 9., and the dependent condition to which it is now reduced, are considered together.

Before the passing of that act, or at least until the year 1887, the constitutional and the municipal law of *England* with respect to parliamentary privilege were supposed to coincide, and appeared to stand thus:

The two houses of parliament have certain important functions and duties to discharge, both collectively, as a parliament, and distributively, as branches of the parliament.

The parliament acts in its collective capacity when the three estates of the realm,—the spirituality, the peerage, and the commons,—in parliament assembled, approach the throne for the purpose of giving their concurrent tacit assent to those laws which the sovereign, in their presence, enacts (*Hadelow v. The King*, *in error*, H. 22 E. 3. fo. 3. pl. 25.; *Whitelock*, *Parliamentary Writ*, vol. i. 406.; *Hale's Jurisdiction of the Lords' House*, 4. 10, 11. 14.); such assent being inferred from the presence of the estates at the time of the actual enactment, preceded by their advice, and

either of the houses of parliament, set at liberty, whether the party at whose suit execution was pursued, was for ever after barred and disabled to sue forth a new

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prospective assent, given by passing the bills in their respective houses. *

Except in this ultimate and operative stage of legislation, the peculiar functions of parliament are exercised distributively in their separate houses. Some of these functions are common to the whole parliament, though exercised separately; others are peculiar to the commons, others to the lords, as consisting of the spirituality and the peerage; others, it would seem, to one of those estates, the lords temporal, only. The unrestricted exercise of all these several functions by the parliament, whether acting collectively or in its twofold or in its threefold division (*Cott. Rec.* 11, 12, 13.), appears to have been formerly considered essential to the due maintenance of the constitution.

To ensure the unrestricted exercise and due discharge of these functions, the parliament was, up to the period in question, supposed to be clothed with all privileges necessary to the exercise and discharge of these

functions, and to be invested with all powers required for the assertion and maintenance of these privileges.

The nature and extent of the *privileges* of parliament would be prescribed to those who were called upon to exercise and to maintain them, partly by the nature of the duties, the uninterrupted discharge of which those privileges were designed to protect, and partly by the varying circumstances under which those duties were from time to time required to be discharged. The *powers* of parliament would be regulated, not only by the nature of the privileges to be asserted and maintained, but also very materially, by the form and shape in which those privileges might from time to time be assailed. To foresee all the emergencies which may arise, and to fix by anticipation, in what particular manner such emergencies shall be met and dealt with at the moment they shall arise, would be impossible. It has, therefore, hitherto been left to the parliament, whe-

* It is a mischievous error to regard the King as forming *part* of the parliament. The connexion between the King and the three estates of the realm assembled in parliament is the same as that which subsists between the King and those estates—the people at large—out of parliament, (*Cotton's Records*, 710.), the King not being, in either case,

a member, branch, or co-estate, but standing solely in the relation of sovereign and head. *Rot. Parl.* vol. iii. 623. a., iv. 135. a. b. 326. b., v. 508., vi. 98. a. 240. a. 241. b. 242. a.; *4 Co. Inst.* c. 1.; *Cotton, Rec.* 4. 7. 10. 281. 329. 389. 425. 664. 670. 709. 712. 713., 714.; *stat. 1 W. & M. sess. 2. c. 2.*; *Bac. Abr.* tit. *Prerogative*, 5th and 6th ed. vol. v. 486.

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writ of execution in that case," enacts, "that the party at or by whose suit such writ of execution was pursued, his executors or administrators, after such time as the privilege of that session of parliament in which such privilege shall be so granted shall cease, may sue forth and execute a new writ or writs of execution, in such manner and form as, by the law of this realm, he or they might have done if no such former execution had been taken forth or served; and that no sheriff, bailiff, or other officer from whose arrest or custody any such person so arrested in execution shall be delivered by any such privilege, shall be charged or chargeable with or by any action whatsoever for delivering out of execution any such privileged person, so, as is aforesaid, by such privilege of parliament, set at liberty." (a) Here, the

ther acting collectively or distributively, to decide, from time to time, as the necessity for deciding has occurred, both what privileges were required for the due discharge of its functions, and what powers were indispensable for the maintenance of those privileges. Such powers, like all others entrusted to human agency, are liable to abuse, both intentional and unintentional. But until lately it was never contended that the possibility, or even the fact, of such powers being abused, was a ground for denying their existence. The old doctrine,—that the extent of parliamentary privilege was to be judged of directly and conclusively by those only upon whom the constitution had thrown the burthen of discharging the functions which those privileges were to enable them to perform, and that the extent of the powers necessary for the assertion and maintenance of

those privileges, was to be determined by those whom the constitution called upon to exercise from time to time all powers which the due assertion and maintenance of those privileges might require, was, however, so much brought into question by the decision of the court of Queen's Bench in *Stockdale v. Hansard*, that it was supposed, by a majority of the House of Commons, to be expedient, in order to meet the particular emergency above mentioned, and to avoid those difficulties which might arise from the assertion of its privileges, to resort to the aid of the legislature; although the non-possession of the power of self-protection appears to be thereby virtually admitted.

(a) The third section provides, "that this act, or any thing therein contained, shall not extend to the diminishing of any punishment to be hereafter by censure in parliament in-

process does not mention that the party is privileged ; and there has been no actual molestation. In *Benyon v. Evelyn* (a) Sir Orlando Bridgman, then Lord Chief Justice of the court held that the replication was bad,

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flicted upon any person which hereafter shall make or procure to be made any such arrest as is aforesaid."

(a) In *Benyon v. Evelyn*, the defendant, in assumpsit, pleaded the statute of limitations (21 Jac. 1. c. 16.); the plaintiff replied that the defendant, at the time of the promise, and from that time until the dissolution of the long parliament by the death of *Charles I.*, was a member of parliament, and that by the privilege of parliament, every person being a member thereof, is and ought to be free from all actions, writs and prosecutions, unless for treason, felony, or breach (*infra*, 461.) of the peace, so that it is not lawful to sue out any original writ or bill against a member of parliament from any of the king's courts, sitting the parliament; and that from the death of *Charles I.* to the restoration of *Charles II.*, there was not any court of Chancery of our Lord the King from which an original writ could issue, nor any other court of record of our Lord the King open in which the plaintiff could have brought his action. in that interval; and that the action was brought within six years after the restoration. The defendant rejoined, that the court of Chancery and other inferior courts had been always open. The plaintiff surrejoined, that the king's courts had not been always open. Whereupon the defendant demurred.

In this case the cause of

action, which accrued in *July 1645*, would have been barred by the plea, unless the record had disclosed matter of exception out of the statute, continuing down to the commencement of the six years next preceding the commencement of the suit in 1662. It was held that the action was barred by the statute; and it was so held upon two distinct grounds, each of which rendered it totally unnecessary to enter upon any inquiry as to the existence or nonexistence of any exemption from liability to be sued, by reason of privilege. First, the statute of limitations contains no exception in respect of privilege of parliament; so that although it should have appeared that the member was not suable, the debt would, notwithstanding the hardship of the case, have been barred by lapse of time, if the parliament had continued to sit for six years after the accruing of the cause of action. Secondly, supposing the non-suability of the defendant by reason of privilege to have suspended the operation of the statute, as infancy, imprisonment, &c. would have done, still upon the dissolution of the parliament in *January 1648-9*, the statute would begin to run, and the six years would expire in *January 1654-5*, unless the illegality of the existing courts, sitting under usurped authority, — or rather the absence of courts of royal appointment, — furnished a new excuse. But the statute

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being of opinion that a member of parliament *might* be sued even while the parliament was sitting. *Prynne* says (a), "My twenty-second authority wherewith I shall acquaint you, is the *Remonstrance of the Lords and Commons in Parliament assembled*, 2d of November 1642, in answer to a declaration under His Majesty's name, 26th of May 1642, where (in the case of the then demanded impeached members, and controversy con-

of limitations has anticipated no such case, and contains no exception which would meet it.

With respect to these two objections to the replication, which were referred to by *Campbell* Attorney-General in *Stockdale v. Hansard* (*Proceedings*, &c. 86.), it may be further observed, that supposing each of the plaintiff's answers to be good *per se* for the respective portions of time to which they applied, it does not follow that they could have been made available in connection with, or in continuation of, each other. For though the late statute of 3 & W. 4. c. 27. (ss. 16, 17, 18.) provides for a *succession* of disabilities in respect of rights of entry upon real property, the statute of 21 Jac. 1. c. 16. contains no such provision either in the saving as to rights of entry in the second section or as to the time for bringing personal actions in the seventh; and no instance has been found, where under the statute of *James*, six years having elapsed since the cesser of the particular disability which existed at the time the cause of action accrued, the right of suing has been treated as preserved by a second disability arising before the first was removed. How-

ever this point may stand, the plaintiff's right of action in *Bonyon v. Evelyn* would be destroyed by the validity of either of the two exceptions set up by the replication in that case. Under these circumstances any inquiry into the extent of the parliamentary privilege in that case was for each of the reasons perfectly immaterial. Besides which, the cases cited by *Bridgman* C. J. in support of his extrajudicial dictum, were, for the reasons stated by the Attorney-General in *Stockdale v. Hansard* (though passed over without notice by the court), not only insufficient to support the opinion which they were cited to establish, but were wholly irrelevant. The extraordinary discussion entered upon by the Chief Justice of the Common Pleas, seems to have been listened to in silence by the rest of the court; none of whom, like the Chief Justice, had been driven from the House of Commons,—a circumstance which may, in a great measure, account for the course taken by him upon an occasion, when no opinion as to the extent of parliamentary privilege was called for, and when *no parliament was sitting*.

(a) *Fourth Register*, 818, 14.

cerning them) as the Lords and Commons denied that His Majesty, or any other person may upon suggestions or pretences of treason, felony, or *breach* of the peace (a), take the members of parliament out of either house, without giving satisfaction to the house, whereof they are members, of the grounds of such suggestion or accusation, and without or against their consent, whereby they may dismember a parliament when they please, and make it what they will, when they will under false pretences and accusations, of such or so many members of both or either House of Parliament taken out of it at any time by any persons to serve a turn, as to make a major part of whom they will at pleasure.

Upon which grounds they voted and declared the impeachment of His Majesty's attorney against the five members, and the King's coming personally unto the Commons' House to command and apprehend them, 4th *January* 1641 (b), to be a high breach of the rights and privilege of parliament, inconsistent with the liberty and freedom thereof, 5th *January* 1641, and afterwards.

(a) The excepted cases were, treason, felony, and *surety* of the peace, that is, cases where security was demanded against an *anticipated breach* of the peace, *Prynne's* expression might, from the context, naturally be supposed to apply to breach of the peace already committed; and it seems to have been so understood in Mr. *Lechmere Charlton's* case, (2 *Mylne & Cr.* 316. *Proceedings in Stockdale v. Hansard*, 40. 93.) in which the attention of the committee does not appear to have been directed to the consideration of the different degrees of urgency existing with reference to cases where a breach of the peace is to be prevented and where it is to be punished. *Et vide supra*, 459. (a)

(b) i. e. 4 Jan. 16 Car. 1., or 1641-2, being the *tenth* month of the year 1641 O.S. This particularity will not appear to be altogether unnecessary, when it is remembered that the regular and unopposed distribution of printed papers in the summer of 1641, was considered, in the case of *Stockdale v. Hansard*, to be a circumstance entitled to little or no weight, and which ought not even to have been referred to, as having occurred *after* the rupture between king and parliament on the 4th of *January* in that year; it being in that case assumed that an event which happened in *January* 1641 must necessarily have preceded every thing which took place in or after *May* 1641.

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So, on the contrary, they answer, we did not say that no member of either House ought to be meddled withal for treason, felony, or any other crime, without the cause first brought before them, that they may judge of the fact, and their leave obtained to proceed. But we do say (which was the highest peg they wound up their privilege to), that no member of either House ought to be declared or adjudged a traitor, or proceeded against in any other court or way than in parliament, whereby he may be taken or detained from the service of the parliament, or the parliament deprived of a member, without their consent. But that he may be arrested in such cases, or detained in safe custody in order to his appearance before the parliament, and to the intent, and till such time, that he may be brought *corpus cum causâ*, with his cause, before the parliament, we did not, nor cannot deny. So as the true old grand privilege of the members of both Houses, is an exemption from all arrests and imprisonments of their bodies in all civil personal actions (except in these special criminal causes), by attachments or *capias* out of any other courts of justice, sitting parliaments; that the Houses may not be deprived of their members, nor they detained from the service of the parliament, by any other persons at their will and pleasure, without the House's leave obtained; not a protection or exemption from all actions, suits, process, judgments, or executions in other courts of law and equity, whereof the parliament hath no jurisdiction, without any restraint or imprisonment of their persons; which both Houses never claimed, as an antient necessary privilege, by any public declaration, remonstrance, or petition that I have hitherto seen; which, doubtless, they would have frequently done, had there been any such ancient privilege, as well as in cases of arrests and imprisonments." (a)

(a) The question whether to a breach of privilege appears to have been more or less the bringing of actions amounted

The uniformity of process act (a), it may be admitted, leaves the question where it was before.

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TINDAL C. J. The question in this case is, whether it is an irregularity to sue out a *capias ad satisfaciendum* against a member of parliament during the time of privilege, for the purpose of proceeding to outlawry.

The first point to be considered is, whether it is irregular generally to sue out such a *capias ad satisfaciendum*; and, if so, the next point is, whether the object of the plaintiff in issuing the process can make any difference as to the regularity or irregularity of the proceeding.

In order to determine the first question, it will be proper to consider the origin of the writ of *capias ad satisfaciendum*. At common law no *capias* issued in proceedings purely civil. But where a *capias ad respondendum* was given by statute, the courts held, that in order to secure to the plaintiff the fruits of a judgment obtained in an action commenced by *capias ad respondendum*, a writ of *capias ad satisfaciendum* should issue after

considered in the following cases: *Biggs's case*, 32. *Lords' Journals*, 185.; *Butler's case* (commitment for indicting serjeant-at-arms), *Lords' Calendar*, 267.; *Burrow's case*, *Ib.* 265.; *Crosby's case*, 19 *Howell's State Trials*, 1138., 3 *Wils.* 199., 2 *W. Bla.* 754.; *Clarke's case*, 2 *Lords' Journals*, 93.; *Diggs's case*, 2 *Lords' Journals*, 66.; *Elford's case*, 18 *Commons' Journals*, 420.; *Fitzherbert's case*, *F. Moore*, 340.; *Hogan's case*, 2 *Lords' Journals*, 233.; *Hyde's case* (1788), 38 *Lords' Journals*, 240.; *Jay v. Topham*, 12 *How. Sta. Tri.* 821., *suprà*, 457.; *Leighton's case*, *Lords' Calen-*

dar, 257.; *Marsh's case*, cited, *Latch*, 150.; *Regina v. Patey*, 2 *Lord Raym.* 1105., 2 *Salk.* 503., *Holt*, 256., *Proceedings in Stockdale v. Hansard*, 52.; *Rex v. Williams*, 10 *Commons' Journals*, 21.146. 215.; *Bishop of St. David's case*, 1 *Rot. Parl.* 61 b.; *Sorocold's case*, *Lords' Calendar*, 263.; *Sturmy's case*, 9 *Commons' Journals*, 399.; *The Umbrella case*, *Lords' Journals*, 26th March 1827.

(a) Under that statute (2 & 3 G. 4. c. 29.) process to enforce the appearance, in personal actions, of persons having privilege of peerage or of parliament, is the same as against other persons.

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judgment. By the statute of *Marlebridge* (a), a *capias ad respondendum* was given in actions of account; and the remedy was extended to other actions by subsequent statutes (b), and as far as can be ascertained, the *capias ad satisfaciendum* was awarded by the court, in those cases in which a *capias ad respondendum* was allowed by statute to issue. But it only lies against persons who are subject to a *capias ad respondendum*. (c) It is necessary, therefore, to inquire whether a member of parliament is, during the time of privilege, liable to a *capias*

(a) 52 H. 3. By that statute, c. 28., it is provided, that if bailiffs who ought to account abscond (*se subtraxerint*) and have no lands or tenements by which they can be distrained, their bodies shall be attached, so that the sheriff in whose bailiwick they may be found (*inveniantur, antè, 440.*) may cause them to come to render account. No *capias ad respondendum* was given by this statute if there were lands or tenements by which the defendant could be distrained; and the value of the lands or tenements was immaterial, *De Boy's case*, H. 3 E. 2., *Maynard*, fo. 69.; *S. C. Fitz. Abr.*, tit. *Brief*, pl. 791.; provided the lands, &c. were in the county in which the money was alleged to be received, H. 6 E. 2., *Mayn.* fo. 186. *Fitz. Abr.* tit. *Brief*, pl. 806. But lands, &c., of which the accountant was seised in right of his wife, created no exemption unless there had been issue between them (which would create an inchoate tenancy by the curtesy). *Adams's case*, P. 4 E. 2. *Mayn.* fo. 99. If a party who has lands or tenements in the

county in which he is charged as receiver, is taken upon a *capias*, he may have a writ to the sheriff, to discharge him and warn the plaintiff to answer for the proceeding; *Registrum Brevium*, 137. And see M. 17 E. 2. *Fitz. Abr.* tit. *Proces*, pl. 208.; 2 *Inst.* 144., *antè, 440. n.*

The statute of *Westm.* 2. (13 *Edw.* 1.) c. 11. authorises the auditors to imprison certain classes of accountants, and gives an exigent against them.

(b) The 25 *Edw.* 3. c. 17. directs that such process be made on writs of debt, detinue of chattels, and taking of cattle, (*qu replevin* or *trespass de bonis asportatis*), by writ of *capias* and process of exigent upon the return of the sheriff, as is used in writs of account. The 19 H. 7. fo. 9. gives the like process in actions on the case, as in actions of trespass or debt. In trespass *vi et armis*, a *capias ad respondendum* and *ad satisfaciendum*, lay at common law in respect of the breach of the peace; Sir *William Herbert's case*, 3 *Co. Rep.* 11. b., 12. a.

(c) Sir *W. Herbert's case*, *ubi suprà*.

ad respondendum. In all cases peers and members of parliament are exempted from being *taken* upon any *capias*. The books of practice lay this down distinctly. From the earliest times, members of parliament taken upon a *capias*, have been discharged from custody by writ of privilege. In the older books we find an exception; which exception shews that in other cases members of parliament cannot be imprisoned. In *Harris v. Lord Mountjoy* (a) the goods of the defendant were attached, according to the custom of *London*, in the hands of the garnishee. (b) The case being removed into this court, by writ of privilege, the question was, whether the defendant, a lord of parliament, should find bail. The court held that he should find bail; *for, though the condition would be void as to rendering the body of the defendant to prison in execution, it would stand as to the other alternative, the payment of the condemnation money.* The report states, that all the justices were of clear opinion that for execution upon a statute staple merchant upon the statute of *Acton Burnell*, or upon the statute of 23 *Hen. 8.*, the body of a baron of parliament shall be taken in execution; for, by these statutes, such persons are not exempted. The very exception as to allowing imprisonment under these statutes shew that the privilege exists, although it cannot prevail against an act of the legislature. (c). So, in the *Executors of Skewis v. Chamond* (d), where a member of the House of Commons had been taken in execution upon a writ of *exigent* issued upon a *capias ad satisfac-*

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(a) 2 *Leon.* 173.(b) See *Bruce v. Wait*, in error, *antè* Vol. I. p. 1.(c) In *Anon.* 4 *Leon.* 6., "it was holden by the justices, that a nobleman shall be bound with his bail in a recognizance to render his body; and thatupon the stat. 13 *E.* 1. If he has not goods or lands (*antè*, 440. n.) his body shall be taken in execution; for clerks only are excepted." Agreeably to the maxim *Exceptio probat regulam, de non exceptis.*(d) *Dyer*, 59.

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ciendum. In that case one *Trewynnard* was imprisoned upon a writ of *exigent*, which had issued upon a *capias ad satisfaciendum* upon a judgment obtained by the testator, *Skewis*; and he being so in execution, a writ of privilege of parliament issued to *Chamond*, sheriff of *Cornwall*, reciting that *Trewynnard* was a burgess, and also reciting the custom of the privilege of parliament. By virtue of which writ the sheriff, during the session of parliament, let *Trewynnard* go at large. The executors of *Skewis* brought an action of debt against *Chamond* for the escape. Upon demurrer, one question raised was, whether the privilege was allowable in the case of a burgess taken in execution during the sitting of parliament. The court held that it was; and added — that every privilege is by prescription (*a*), and every

(*a*) During the controversy, already referred to, between the House of Commons and the corporation of *London* in 1839, as to the right of the former to animadvert, in their printed reports, upon the practice of allowing obscene books to be admitted into the city prisons, it was a favourite argument with the speakers and writers who opposed the right claimed, that all such rights must rest upon *prescription*, and must, therefore, to be valid, have existed from the time of *Richard I.*

To apply “prescription” in this very technical sense, to the claims of the House of Commons, would strip them of all privilege. The House cannot be shewn to have existed, as a separate branch of the legislature, at that remote period.

The persons who contend for this narrow construction of the term “prescription” with reference to the rights and privileges

of the House of Commons would be most unwilling to submit other rights and privileges to the same test.

The rector’s *common law* right to *parochial* tithes is founded upon a decretal epistle written within time of memory.

The equity court of Chancery, with its countless accumulations of suitors’ funds, has, long since the period of legal memory, come into existence by mere encroachment and connivance, without any statutory or other legitimate foundation. No exercise of equitable jurisdiction by the House of Peers, can be traced further back than the reign of *James I.* Even the antient court of Common Pleas, until the passing of the uniformity of process act (*antè*, 462.), had its ordinary jurisdiction by *capias quare clausum fregit*, by virtue of a fiction first imagined in the reign of *Charles II.* The contrivance adopted by this court was how-

prescription which sounds for the common weal is good; although it be to the prejudice of any private individual. It may well be, that by reason of this pre-

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ever resorted to only for the purpose of recovering a portion of that jurisdiction of which it had, by a series of judicial encroachments, been deprived, in violation of the express provisions of *Magna Charta*, — a legislative measure said to have been treated with little reverence by the Restoration judges. *Vide* 6 *Howell's State Trials*, 993.; *Proceedings in Stockdale v. Hansard*, 22. 50. 94.

So also the court of King's Bench, long within the period of legal memory, was a court of appellate, and a court of criminal jurisdiction, exercising direct civil jurisdiction only over its own servants, and over persons in the custody of those servants, upon charges of a criminal nature. The very powers by which that court was enabled to hold plea in *Stockdale v. Hansard*, were acquired by allowing persons to be sued there *because* it was alleged that they were in custody upon a criminal charge, and then refusing to permit the truth of such allegation to be questioned.

The court of Exchequer, — a court of revenue, — was converted into a court for common pleas by an equally bold fiction.

The great difference between the exercise of new powers on the part of the Houses of Parliament and by the courts of law, appears to be this; that in the former case new powers were called into active existence by the exigencies of the times; somewhat in the same manner as injuries in the animal eco-

nomy are repaired by processes, for which no provision might, until the time for exerting them arises, be supposed to exist; whereas the new powers assumed by the courts of law, were mere encroachments by one court upon another, with no other object than the extension of their own authority, and the increase of the emoluments of their own officers.

The connection between the stability of legal rights and the coronation of *Richard I.* on the 7th of *July* 1189, is not, at first sight, very obvious.

At common law, a person suing for a freehold was bound to shew that he or his ancestor had been in possession within time of memory; that is, within the memory of a person living, or of his father, who, if not present at the actual feoffment or investiture of the party *disseised*, had seen him in peaceable seisin of the land, and acting as one of the *pares* of the lord's court; the rule of law formerly being that no man could prove any matter unless it had been seen by himself; or by his father, who had enjoined him to testify the fact. *Bract.* lib. 5, cap. 5, s. 3, fo. 373. a., 2 *Inst.* 94.

It being found inconvenient to leave the rights of parties dependent on the longevity of witnesses, it was thought desirable to remove this uncertainty, without materially enlarging or abridging such rights.

The first fixed epoch appears to have been the accession of

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scription, which is for the common good, members of parliament are exempt from liability to be taken under a *capias ad respondendum*; and, if so, as we have already

Henry I. (on the 1st of August 1100). So matters continued until 1235, when it was thought that a period of 135 years was an unreasonable substitution for the reach of human memory, occasionally prolonged by the injunction above referred to,—from its nature, of too rare occurrence materially to affect the period of limitation.* By the statute of *Merton* (1235), c. 6, an epoch, more nearly approaching the actual duration of human remembrance, was introduced; viz. the coronation of *Henry II.*, which had taken place eighty-one years before, namely, on the 20th of October 1154. In 1275 the eighty-one years had swollen to 121 years; which being considered an absurdity, a new epoch was introduced; viz. the time of *Richard I.*, i. e. his coronation in 1189, being eighty-six years before. This continued unaltered till 1540, when the more convenient rule †, of sixty years before action brought, was introduced. During the whole interval between 1275 and 1540, the coronation of *Richard I.*, in 1189, was the period of legal memory in respect of writs of right; shorter periods being adopted with respect to the limitation of possessory actions. From the very frequent recurrence of this, as

the longest period of limitation, in the discussions which took place daily in this court in respect of real actions, it was thought convenient by the judges, that in all other cases of customary or prescriptive rights, depending upon the memory of man, the same epoch should be resorted to. And this usage, resting solely upon the arbitrary introduction of a rule of analogy resting upon the statute of *Edward I.* in 1275, had become so inveterate before 1540, that when the statute of 1275 was repealed in 1540, a rule which had no other foundation than the repealed statute, was tacitly allowed to remain, and it has continued down to our own times. *Vide 2 & 3 W. 4. c. 71.*

For no better reason, therefore, than this,—that in 1275, eighty-six years was thought to be not an unreasonably long time (*temps mult passe*) to allow to suitors for the assertion of a right to land,—a possession of 650 years is considered to be now necessary to the establishment of rights, to which the statute does not in any way allude. It is also a circumstance not to be overlooked, that not only these modifications of the period of legal memory, but the judicial application of them to collateral objects, have taken place since the reign of *Rich-*

* As such an injunction would seldom be given until a dispute had arisen, the parental communication would resemble a deposition in a pending cause,

rather than evidence taken under a bill to perpetuate testimony.

† 2 *Rot. Parl.* 300 b, 312 b, 366 a.

seen, they are exempt from liability to be taken under a *capias ad satisfaciendum*.

In 2 *Hale*, P. C. 195. it is said, "Although in civil actions between party and party, regularly a *capias* or exigent lies not against a lord of parliament of *England*, whether secular or ecclesiastical, yet in case of an indictment for treason or felony, yea, or but for a trespass *vi et armis*, — as an assault or riot, — process of outlawry shall issue against a peer of the realm; for the suit is for the king, and the offence is a contempt against him. And, therefore, if a rescue be returned against a peer, 1 *H. 5.*; or, if a peer of parliament be convicted of a disseisin with force, *H. 32 Eliz. B. R. Croke*, n. 9., *Lord Stafford's case* (a); or denies his deed, and it be found against him, *M. 38 & 39 Eliz. B. R. Croke*, n. 26., the *Earl of Lincoln's case* (b), a *capias pro fine* and exigent shall issue; for the king is to have a fine; and the same reason is upon an indictment of trespass or riot, and much more in the case of felony." The general exemption, to which it is allowed by Lord *Hale*, that a lord of parliament is entitled, may fairly be regarded, for this purpose of privilege, as extending to members of the House of Commons during the time of privilege.

Then, if it be irregular to sue out a *capias ad satisfaciendum* against a member of parliament, it can make no difference with what *intention* the process is issued.

ard I., and are, therefore, themselves posterior to the very period at which all such rights are said to be fixed.

Such is the nature, origin, and history of a standard by which it is contended, by writers of great weight and respectability, that the functions, the powers, the rights, and the privileges of parliament are to be measured. Thus upon a rule of practice, introduced by the sole au-

thority of the court of Common Pleas, in case of suitors in respect of whom the legislature had omitted to define the extent of human memory, are the privileges of the Imperial Parliament, the constitution of the United Kingdom, and the political rights of the subjects of the British Empire, made to depend.

(a) *Cro. Eliz.* 170.

(b) *Ibid.* 508.

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The intention of the party who issues the writ cannot make it the more or less irregular. The duty of the sheriff is to obey the mandate contained in the writ which is delivered to him; or if he acted upon directions from the plaintiff, the plaintiff might change his intention, and call upon the sheriff to take the defendant according to the exigency of the writ. But, in reality, the intention of issuing the writ merely for the purpose of proceeding to outlawry against the defendant, instead of diminishing, rather increases the difficulty. The object avowed is, to issue a writ of *exigi facias*, by which the sheriff is commanded to require the defendant to render himself into his custody. The statutes which have been referred to appear to me either not to bear upon the point, or to make against the present application. Before the 12 & 13 *W. 3. c. 3.*, members of parliament held themselves to be privileged from being sued. (a) By that statute parties were enabled to sue peers and members of parliament while the parliament was not actually sitting; but a reservation was made of their right to immunity from personal arrest. The statute of 10 *G. 3. c. 50.*, allows suits against members while the house is actually sitting, as well as during the recess of parliament; with the same reservation of the right of freedom from arrest. A similar reservation is contained in the recent statute 2 *W. 4. c. 39.* in express terms.

If a writ of *capias ad satisfaciendum* could be issued in this case, we should be ordering the sheriff to arrest

(a) An exemption from being sued, or at least from being served with process, might be reasonable at a time when suits were so conducted, that by defending them, a member would be disabled from applying himself to his parliamentary duties, so entirely as the nature and the importance of those

duties required. In the Close Rolls of 1315 (8 *E. 2. Ryley, Plac. Parl.* 551.), the reason why assises and verdicts should not be taken against peers or members during the sitting of parliament, is stated to be, that their interests could not, during their necessary absence, be so well protected.

a person who, immediately upon being taken, would be entitled to his discharge.

I think the order made by my brother *Erskine* in this case was properly made, and that this rule for setting it aside ought to be discharged with costs.

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BOSANQUET J. I also am of opinion that this rule ought to be discharged. There is no doubt,—and it is not denied on the part of the plaintiff,—that the members of both houses of parliament are privileged from arrest. Formerly they were exempt from being sued. (a) Their exemption from arrest is recognised in various acts of parliament. The arrest, therefore, of a member of parliament would clearly be an illegal act. But if the thing ordered to be done be illegal, the order must also be illegal. It is said that the object of the plaintiff in issuing this writ is not to molest the person of the defendant, but to place himself in a position to issue a *capias utlagatum* against the defendant when the period of privilege shall have ceased. But the writ requires the sheriff to do an act immediately, which act, if done by that officer in obedience to the writ would be a violation of the privilege of parliament, and would throw upon the defendant the trouble and the expense of obtaining that discharge to which he would be undoubtedly entitled. Upon this short ground I am of opinion that the writ was illegal. The plaintiff avails himself of the authority of the court to order the defendant to do an act that is illegal.

MAULE J. I also think that this rule ought to be discharged. The statutes of 11 & 12 *W. 3. c. 3.* and 10 *G. 3. c. 50.* give to persons who have demands against peers and members of the House of Commons, the power of suing by a particular mode of proceeding, not by a *capias* but by summons. If the defendant was

(a) *Ante*, p. 470.

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not liable to be arrested, a writ by which the sheriff is commanded to arrest the defendant must be irregular. This was the ground upon which the proceedings were set aside by this court in *Fortnam v. Lord Rokeby*. (a) The *capias* was held to be irregular, on the ground that the defendant was not liable to be arrested, although he had been merely served with a copy of the process, no attempt having been made, or any intention manifested (b), to proceed to an arrest. In *Briscoe v. Lord Egremont* (c), a bill of *Middlesex*, though merely a serviceable process, was held to be irregular.

It is indeed admitted, on the part of the plaintiff, that in a case of privilege of *peerage*, such a proceeding as has been attempted in this case, could not have been supported. It is true, that the privilege of peers and that of members of the House of Commons stand upon somewhat different grounds; since otherwise peeresses would not be entitled to privilege. (d) The distinction does not, however, apply to the matter in hand. The privilege of parliament attached to all the members of the parliament when the two houses sat together (e); and it has belonged to the members of each house since they have sat separately. It belonged to all who were called upon to perform the same important duties.

ERSKINE J. When I made the order appealed against, it appeared to me, and I still think, that the proceeding was irregular. The principle upon which I acted in making that order has been fully stated by the court. In addition to the cases which have been ob-

(a) 4 *Taunt.* 668.; *antè*, 450.

(b) There could have been no arrest at that time without an affidavit to hold to bail.

(c) 3 *M. & S.* 88.; *antè*, 451.

(d) *Antè*, 451. (c)

(e) As to the houses sitting

separately or together, see *Rot. Park* vol. i. pp. 1. 23. 76. 104. 159. 351. 383. 416. 442, 443. 453.; vol. ii. pp. 7. 12. 53. 54. 56. 57. 64. 65. 66. 69. 105. 107. 112. 113. 117. 127. 148. 200. 237. 322. 364.; vol. iii. pp. 167. 304. 486.

served upon, I would refer to that of *Bailes v. Crew* (a), in which the rule is laid down, that where no *capias ad respondendum* lies, there no *capias ad satisfaciendum* or *exigent* can be awarded. Formerly a plaintiff could not have commenced an action against a person having privilege of parliament, still less could any proceeding to outlawry have been supported. Before the 12 & 13 W. 3. c. 3. no process at all could have issued against a member during the time of privilege. That statute points out what process shall be allowed to issue. Not only does the statute contain no words which allow a proceeding to outlawry, but it does contain words which shew that it was intended that no process, other than that given by the statute, should be issued. When the statute says that the member shall not be arrested, it impliedly forbids the issuing of a *capias*. The 10 G. 3. c. 50. is more general in its language; but the object of that statute was only to extend, to all time, the liberty given by the statute of *William* to sue during the intervals between the sittings of parliament. (b) The court ought not to place in the hands of a suitor a process which it would be illegal for him to execute.

Rule discharged, with costs. (c)

(a) "A writ of error was brought upon a judgment given in the Common Pleas on a bill of privilege brought by an attorney of the said court upon an obligation; and upon the said judgment issued forth process of execution, upon which the defendant was outlawed; and the error was assigned in this, that upon that judgment, process of outlawry doth not lie, for *capias* is not in the original action; and so was the opinion of the whole court, being upon a bill of privilege; and the outlawry was reversed." 1 *Leon.* 329.

(b) It also enables parties to sue in all courts of record, instead of restricting them to the superior courts.

(c) And see *Jackson v. Kirtton*, 1 *Brownl. & G.* 91.; Sir *Ralph Everden's* case, *M.* 38 *E. 3*, fo. 30, pl. 18.; *Wolverton's* case, 2 *Rot. Parl.* 19.; 22 *Ass.* fo. 90, pl. 24., *H.* 35 *H. 6*, fo. 46, pl. 8.; *Ryl. Plac. Parl.* 566., *Serviens ad legem*, 177. 274.

The antient practice in such cases is shewn by the writ of *supersedeas* and the proceedings and judgment thereon.

"The King to the sheriffs of the city of *York*, greeting:

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know ye that We, by Our writ to Our justices of the bench, directed, have recorded (*antè*, 452. n.) that *E. N.*, late of *L.*, knight, is one of the barons coming to Our parliaments by Our summons; wherefore We will that if *E.*, before them, at the suit of any one by action personal, be impleaded, they cause to be made against him in such action, such process, and no other, as against lords, magnates, earls, or barons of Our kingdom of *E.*, who to Our parliaments by Our summons ought to come, or any of them, according to the law and custom of Our kingdom of *E.* is to be made. And because no process against any of them, by attachment of their bodies, or by writs of *exigent*, ought to be made, but to be brought into Our court to answer in such pleas by summons, attachment, and distress by their lands and chattels, We command you that you surcease altogether to demand [*de exigendo*] to take or in any thing to molest the said *E.* by reason of any Our writs or writ of judgment, remaining with you, which have issued from the said court of the bench: and how, &c.

At which day comes here the said *E.* by *I. B.* his attorney; and the now sheriffs of the city aforesaid, to wit, *I. G.* and *W. W.*, return, that at the county court of the city of *Y.*, holden there on *Monday*, to wit, the 17th day of *September*, in the thirty-second year of the reign of the lord the now king, and so at four county courts next preceding, the said *E.* was demanded, and did not appear; and because he appeared at none of the said county

courts, he was outlawed; as *I. I.* and *I. W.*, late sheriffs of the city aforesaid, the last predecessors of the said now sheriffs, have, on the back of the said writ of *exigent*, to them the now sheriffs, delivered; and that afterwards a writ of superseas of the execution of the said writ of *exigent* was delivered to the now sheriffs by their said predecessors, containing therein that by His other writ to His justices of the bench directed, He had recorded that the said *E.* is one of the barons of His kingdom coming to His parliaments, and that He willed that if he should be impleaded before them at the suit of any one by action personal, they should cause to be made such process, and not other, against him, in such action, as against lords, magnates, earls, or barons of His kingdom of *England*, who ought to come to His parliaments, or against any of them, according to the law and custom of His kingdom of *England*, ought to be made.

And, because this was recorded before the justices of the lord the king here, a long time before the promulgation of the outlawry aforesaid; as by the said writ thereof, amongst the records without day affiled, sufficiently appears; and no process against any of them by attachment of their bodies, or by writs of *exigent*, ought to be made, but rather they, by summons, attachment, and distress (but see 1 *Rot. Parl.* 61 b.) by their lands and chattels, in the court of the lord the king, ought, in such pleas, to be brought to answer: therefore let the said outlawry be annulled," &c. *Rastall's Entries*, 313.

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Jan. 15.

Feb. 1.

CASE. The declaration stated, that before the time of the committing of the grievances by the defendants; the defendants, one *Joseph Malachy* and *Thomas May*, one *James Husband* and *Thomas Husband*, and divers other persons, had formed themselves into a company, by the name or style of "The *Wheal Brothers Copper, Tin, Lead, and Silver Mining Company*," for the working and exploring of a certain copper tin lead and silver mine, called and known by the name of "The *Wheal Brothers Mine*," situate in the parish of *Calstock (b)*, in the county of *Cornwall*; which company, before and at the time of the committing of the said grievances, after and before and at the time of the purchase by the plaintiff of divers shares in the said company, as thereafter next mentioned, had been and was an existing company for the purposes aforesaid; and that also before and at the time of the committing, &c. the defendants *Blount, Harrison, and Heathorn*, had In an action by *A.* against *B. C.* and *D.* for false representations alleged to have been made by them, acting as directors of a joint stock company, conversations between *B.* and *C.*, and conversations between *C.* and *E.* a former agent of the company, are admissible in evidence to shew the *bona fides* of the defendants in making such representations.

Books in the hand writing of *E.*, sent by him after he had ceased to be such agent, to the secretary of the company, are not admissible in evidence for the plaintiff, unless it be shewn that the books were kept by *E.* as agent.

An action does not lie for a false representation whereby the plaintiff, being induced to purchase the subject matter of the representation from a third party, has sustained damage, — the representations appearing to have been made *bonâ fide* under a reasonable and well grounded belief that the same were true. (*a*)

(*a*) As to the necessity of the existence of a reasonable ground of belief where there is *bona fides*, see *Haycraft v. Creasy*, 2 *East*, 92.; *Tapp v. Lee*, 3 *Bos. & Pull.* 367.; *Hamar v. Alexander*, 2 *N. R.* 241. 244.; *Scott v. Lara*, *Peake*, *N. P. C.* 226.; *Ames v. Millward*, 2 *B. Moore*, 714.;

Ashlin v. White, *Holt*, *N. P. C.* 387.

(*b*) As to the assessionable manor of *Calstock*, its tenure and its minerals, see 3 *Mann. & Ryl.* 140, 141, 142, 155, 188, 190, 230, 231, 243, 461, 464, 467, 477. As to its tin-bounds in 1559, see *Mann. Each. Pract.* 380. n.; *post.* 507.

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become and were the trustees of the funds and property of the said company; and as such trustees the said *Blount, Harrison, and Heathorn*, before and at the time of the committing, &c. had become and were possessed and interested for the remainder of two unexpired terms of years, of and in the liberties, licences, powers, and authorities (a), before then respectively given and granted to the said *Joseph Malachy* and one *Robert Malachy*, by one *William Worth*, to dig, work, mine, and search for silver, silver ores, tin, tin ores, copper, copper ores, lead, lead ores, and all other metals and minerals in and throughout the said mine; and that the defendants *Blount, Harrison, and Heathorn*, as such trustees, had then become and were also possessed of all and singular the shafts, pits, engines, erections, and buildings, ores, metals, and minerals, machines, utensils, machinery, and all other property of and belonging to the said company; and that also before and at the time of the committing, &c., the defendants had become, and were the directors of the said mining company, with such qualifications, and subject to such conditions as were and are declared by the scrip-certificates of the said company as thereafter next mentioned, and the officers of the said company had been, and were under the sole and entire control of the defendants as directors; and that on the formation of the said company, and thence continually until the committing, &c., the interest and property of the individuals forming the said company, of and in the said mine and the said other property had been and was divided into 5000 shares, and the defendants and the said other persons on the formation of the said company as aforesaid, were then the several and respective par-

(a) As to the nature of the interest acquired under such a grant, see *Doe d. Hanley v. Wood*, 2 B. & Ald. 724.; *Goderrick v. Gascoyne, Latch*, 189.;

Roberts v. Davey, 4 B. & Ad. 664., 1 Nev. & M. 443.; *Jones v. Reynolds*, 6 N. & M. 441, 442. (a).

ties entitled to, and to whom the shares belonged ; and that also the defendants, as such directors, on the formation of the said company, and afterwards and before the committing, &c., had issued and delivered to the said several holders of the said 5000 shares certain scrip-certificates having the names of some three of the defendants as directors, with the consent and approbation of the defendants, as such directors, signed and subscribed thereto by such three directors in the body thereof; and by such certificates the respective bearers thereof were represented and stated to be entitled to the number of shares in the said company, in the said scrip-certificates respectively specified, but subject to certain conditions respectively annexed thereto, which conditions were in substance to the purport and effect following: (that is to say),

“ Conditions for the management of the company. Capital 100,000*l.* in 5000 shares at 20*l.* each. Directors, *E. B. &c.* The affairs of the company to be under the sole and entire control of the directors, three of whom to be a quorum, who are to appoint all officers and servants of the company. The directors to make such calls as shall be required, not exceeding 1*l.* per share, and one month's notice to be given of each call; although it is very improbable that any call will become necessary, *as the directors have funds in hand arising from the working of the mine, to declare dividends for April and May*, and will retain funds for expenses of the working of the mines before a dividend shall be declared. In the event of the nonpayment of any one of such calls within thirty days after the expiration of such notice, the directors shall have the power to declare the shares forfeited, and all dividends, profits, and advantages thereon, to be for the benefit of the remaining shareholders. A general meeting of the shareholders shall be held on the 1st *Wednesday* in *June* 1836, and

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in each subsequent year, when a full statement of the affairs of the company shall be presented. The directors, or any twenty shareholders holding not less than twenty-five shares each, may, at any time, call a special general meeting on giving ten days' notice in the *London Gazette*, or one of the daily newspapers. Each shareholder shall be entitled to the following number of votes at any general meeting or special general meeting, — the holder of fifteen shares shall have one vote, &c., and the chairman the casting vote. All advertisements inserted in, &c., shall, for every purpose, be sufficient notice to every shareholder of the company. The company may be dissolved by a majority of votes at two special general meetings, called for that purpose."

That also on divers and very many days and times between the formation of the company and the times of the committing, &c., divers and very many of the said scrip-certificates, representing the shares or interests of the respective shareholders of and in the company, and, amongst others, divers and very many of the said scrip-certificates representing the shares or interests of and in the company of and belonging to the defendants, were in the public market for sale, and the same so being in the public market for sale, and the defendants so being such directors of the said company, and having the sole and entire control of the affairs thereof, they, the defendants, contriving and intending by fraud and deceit and misrepresentations as thereafter next mentioned, to induce the plaintiff and divers other unsuspecting persons to suppose and believe that the company was formed and established in good faith, and that the mine had been and was yielding and paying, and was then likely to yield and pay, to the respective shareholders of and in the company a large dividend and profit upon the shares respectively held by them; and that the purchase of shares and interests of and in the

company would be an advantageous investment of capital, and to cause the plaintiff and other unsuspecting individuals to buy shares or interests of and in the said company, theretofore, to wit, on the 28th day of *July* 1835, and on divers other days and times, wrongfully and injuriously contriving and intending craftily and subtilly to deceive, defraud, damnify, and injure the plaintiff and divers, &c., did then falsely, fraudulently, and deceitfully cause it to be stated and represented on the said scrip-certificates, that the capital of the said company was 100,000*l.*, and did also then fraudulently and deceitfully cause to be printed, stated, and represented on the back of the said scrip-certificates that the said *Wheal* Brothers' mine had not only paid its way from the commencement of the workings in *January* 1832, but that a dividend at the rate of 18*l.* per cent. per annum had been paid for the month of *March* then last on the *agreed* capital of 100,000*l.*, and that the like dividend had been declared payable on the 15th day of *July* 1835, for the month of *April* then last; and that there were assets in hand to pay the like dividend for the month of *May*; that it was the opinion of the mining agent that when the lode should have been pierced ten fathoms below the then present bottom of the said mine, which would be done in about three months then next, a dividend of from 30*l.* to 40*l.* per cent. per annum would be produced; that the machinery and three water engines, then already erected, were equal to the draining of the mine seventy fathoms; that there were offices, sheds, and all convenient buildings for working the mine and assaying the ores, &c., &c., with all necessary apparatus, furnishing an entire mining establishment, all paid for out of the produce of the mine, and without any call having been made on account of the capital of the company. And that the defendants, on the said 28th day of *July* 1835,

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and on divers other days and times, did also falsely, fraudulently, and deceitfully cause to be printed and to be represented in the said conditions annexed to the said scrip-certificates, that it was very improbable that any call would become necessary, as the defendants had funds in hand arising from the working of the mine, to declare dividends for the months of *April* and *May* 1835, and that they would retain funds for expenses of the working of the mine before a dividend should be declared.

And that the defendants, as such directors, as aforesaid, did also theretofore, to wit, on the 24th day of *July* 1835, and on divers other days and times between that day and the commencement of this suit falsely, fraudulently, and deceitfully cause to be inserted, printed, and published in a certain periodical, called the *Mining Journal*, and in a certain daily newspaper, called *The Times*, divers and very many advertisements, and in and by divers of such advertisements, did then fraudulently and deceitfully state therein and give notice thereby that a dividend of 18l. per cent. would be paid on a certain day, to wit, on the 30th day of *July* 1835, at the said company's office, 26. *New Broad Street*, that a further dividend of 18l. per cent. per annum would be paid on *Monday* the 31st day of *August* 1835, at the said company's office, *New Broad Street*, on the subscribed capital of 100,000l., for the month of *May* 1835. That the defendants, by divers other of the advertisements, did then fraudulently and deceitfully state therein and give notice thereby that a dividend of 18l. per cent. per annum would be paid on *Wednesday* the 30th day of *September* 1835, at the said office of the said company on the subscribed capital of 100,000l. for the month of *June* 1835. And that in and by divers other of the said advertisements did then fraudulently and deceitfully state therein and give notice thereby that a dividend of

18*l.* per cent. per annum would be paid on *Saturday* the 31st day of *October* in the year 1835, at the said office of the said company, on the *subscribed* capital of 100,000*l.* for the month of *July* 1835.

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And that the defendants, in and by divers other of the said advertisements, did then fraudulently and deceitfully state therein, and give notice thereby, that a dividend of 18*l.* per cent. per annum would be paid on *Monday* the 30th day of *November* 1835, at the said office of the said company, on the subscribed capital of 100,000*l.*, for the month of *August* 1835.

And that the defendants, in and by divers other of the said advertisements, did then fraudulently and deceitfully state therein, and give notice thereby, that a further dividend of 18*l.* per annum for the month of *September* 1835, on the *fixed* capital of 100,000*l.* would be paid on *Thursday* the 31st day of *December* 1835, at the said office of the said company; and that in future the dividends would be payable quarterly instead of monthly, as theretofore. And that the defendants, as such directors as aforesaid, in pursuance of such several advertisements, on the said several days and times mentioned and specified in the said several advertisements in that behalf, did fraudulently and deceitfully pay to divers of the shareholders of and in the said company the amounts of the said several pretended dividends of 18*l.* per cent. per annum, so advertised as aforesaid, upon their several and respective shares of and in the said company, for the several months mentioned in the said advertisements as aforesaid: and the defendants did then, and on divers other days and times, fraudulently and deceitfully cause certain memorandums or indorsements of the respective payments of the whole of the several pretended thereinbefore mentioned dividends, to be indorsed upon such of the said scrip-certificates as were held by the shareholders who had received such pretended di-

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 ———— dividends were paid, when they were respectively pay-
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Averment: that the plaintiff, having seen and read divers of the said scrip-certificates respecting divers of the shares or interests of and in the said company, and also having seen and read the statements, representations, indorsements, and memorandums printed and written on the face and back of such scrip-certificates, and having also seen and read the conditions annexed to the scrip certificates, and having also seen and read the said several advertisements inserted, printed, and published as aforesaid in the said periodical and in the said daily newspaper, and believing and confiding in the said several false, fraudulent, and deceitful statements, representations, indorsements, and memorandums, conditions, and advertisements to have been true, and to have been made and published by the defendants on good and sufficient foundation, and having no reason or grounds to suspect to the contrary, afterwards, to wit, on the 1st day of *June* 1836, and on divers other days and times between, &c., was induced to, and did go, into the public market and purchase and buy divers, to wit, eighteen scrip-certificates, representing divers, to wit, seventy shares or interests of and in the said company, at and for a certain large price or sum of money per share, to wit, 12*l.* per share, the said shares of and in the company being then in the public market for sale at a certain discount per share, to wit, 8*l.* per share, divers of which shares so bought by the plaintiff as aforesaid, to wit, forty shares, were bought of one *Richard Wace*, divers other of the said shares, to wit, twenty shares, were bought by the plaintiff of one *John Field*, and the remainder thereof, to wit, ten shares, were bought by the plaintiff of one *Joseph Davis*; *Wace*,

Field, and *Davis* then being respectively the holders of the last-mentioned shares; and that *Wace*, *Field*, and *Davis* then respectively delivered to the plaintiff the scrip-certificates representing the several shares so purchased of them respectively by the plaintiff, together with the memorandums and indorsements of the payment to the respective holders of such scrip-certificates at the time of such payment of the whole of the several pretended dividends thereinbefore mentioned respectively indorsed thereon; and also together with all other the before-mentioned statements, representations, memorandums, and conditions indorsed thereon and annexed thereto respectively.

And that, by reason of the several false, fraudulent, and deceitful statements, representations, indorsements, and memorandums, pretended dividends, advertisements of dividends, pretended payments of dividends, and memorandums and indorsements of such payments, and the other false, fraudulent, and deceitful conduct of the defendants concerning the premises, in manner thereinbefore stated, divers and very many of the shares or interests of the holders of the said scrip-certificates, of and in the said company, before and at the time of the purchase by the plaintiff of the said seventy shares of and in the said company, and of the said scrip-certificates representing the same, in manner aforesaid, were in the public market for sale at an average quotation in price per share, to wit, at 12*l.* per share, and the whole amount of each share, to wit, 20*l.*, was quoted, stated, and represented in the said public market as having been then fully paid up and subscribed by the then scrip or shareholders of and in the said company.

Whereas, in truth and in fact, both before and at the time when the plaintiff became such purchaser of the said seventy shares, and of the scrip-certificates representing the same, in manner aforesaid, the said shares

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or interests of and in the said company were quoted, and bought and sold in the said public market at a much greater price per share than the same were actually and really worth, all which the defendants then well knew.

[The declaration then proceeded, in the same form, to assert that the several other representations stated to have been made by the defendants, were false within the knowledge of the defendants.]

And so the plaintiff saith that the defendants, by by means of the premises, falsely and fraudulently deceived the plaintiff upon the purchase by him of the seventy shares; and thereby the shares became and were, and are of little or no use or value to the plaintiff, and the money so paid by the plaintiff to *Wace, Field, and Davis* on the purchase of the said last-mentioned shares, were and are unreasonable, exorbitant, and unfair prices in that behalf; and the plaintiff hath, by means of the premises, not only lost and been deprived of the benefit and profits which he otherwise might and would have acquired from the use and employment of the moneys so paid by him as aforesaid, but has been put to great expense, amounting, &c., in investigating and ascertaining the affairs of the company, the state of the mine and its working, and otherwise relating to the fraudulent conduct of the defendants, and the falsehood of their fraudulent representations, statements, pretended payments of dividends, and other fraudulent and deceitful acts of the defendants; and the plaintiff has been called upon, and forced and obliged to pay a certain call of 1*l.* per share upon each of the shares so purchased by him, and which call amounts, &c. And the plaintiff hath thereby lost all benefit which he might and otherwise would have derived from the use and employment of the last-mentioned moneys, and the same have become wholly lost to the plaintiff. And the

plaintiff hath been, and is by means of the premises, otherwise greatly injured, prejudiced, aggrieved, and damnified.

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The second count stated the formation of the company: that the defendants *Blount*, *Harrison*, and *Heathorn* had become trustees of the funds of the company, and possessed of two terms, and of shafts, property, &c.: that the defendants had become the directors of the company, with the qualifications, and subject to the conditions, declared in the scrip-certificates: that the affairs of the company were under the control of the defendants, as directors: that the interests of the individuals forming the company had been divided into 5000 shares: that the defendants and other persons were the parties to whom the shares belonged: that the defendants, as directors, had caused to be issued to the holders of shares scrip-certificates, signed by the directors, with the approbation of the defendants, whereby it was represented that the bearers thereof were entitled to the number of shares mentioned in such certificates, subject to the conditions set out in the first count. (a)

The second count then alleged that before, &c., to wit, 1st of *March* 1886, and on divers other days and times between that day and 14th of *April* in the same year, the defendants, as such directors, caused to be inserted and published in a daily newspaper, called *The Times*, and also in a periodical, called the *Mining Journal*, divers, to wit, twenty advertisements, in and by which advertisements the defendants, as such directors, respectively gave notice that a special general meeting of the shareholders of the company would be held on *Thursday* 14th of *April* in the year last aforesaid, at twelve o'clock precisely, at &c., for the purpose of receiving a report of the state of the said mine, and an explanation of the reason for postponing the di-

(a) *Antè*, 477.

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vidend for the then present month; which special general meeting of the shareholders was afterwards, to wit, 14th of *April* in the year last aforesaid, in pursuance of the said advertisements, duly holden, at &c., and divers of the shareholders of the company attended the said meeting, and the defendant *Blount* also attended, and was in the chair, and the other defendants were also present; at which meeting the defendants then gave in, and caused to be read and laid before the shareholders present, a report in writing, purporting to be a report of the then state and prospects of the mine, and also a written statement purporting to be a statement of the accounts of the company from its commencement in *July* 1835 to the 31st of *March* then last; and also an explanation in writing, purporting to explain the reasons for the postponement of the dividend for the three months then last past, and also relating to other matters connected with, and concerning, the mine and the company.

And that on divers other days and times between the formation of the company and the times of the committing of the grievance, &c., divers of the scrip-certificates representing the said shares or interests of the respective shareholders of and in the company, and, amongst others, divers of the scrip-certificates, representing the shares or interests of and in the company of and belonging to defendants were in the public market for sale; and the said scrip-certificates so being in the public market for sale, and the defendants so being such directors of the company, and having the sale and entire control of the affairs thereof, the defendants contriving and intending, by fraud, deceit, and the other subtle ways and means thereafter mentioned, to induce and lead the plaintiff and divers other unsuspecting persons, liege subjects, &c., to suppose and believe that the company was formed and established in good faith, and

that the mine had been and was yielding and paying, and was then likely to yield and pay to the respective shareholders a large dividend and profit upon the shares respectively held by them, and that the purchase of shares or interests of and in the company would be an advantageous investment of capital, and to cause the plaintiffs and other unsuspecting liege subjects to go into the public market and purchase shares or interests of and in the company; theretofore, to wit, 28th of *July* 1835, and on divers other days and times wrongfully contriving and intending to deceive, defraud, damnify, and injure the plaintiff, and divers other liege subjects, did then falsely, fraudulently, and deceitfully cause it to be stated and represented on the said last-mentioned scrip-certificates so issued by the defendants as aforesaid, that the capital of the company was 100,000*l.*, and did also then fraudulently and deceitfully cause to be printed, stated, and represented on the back of the scrip-certificates so issued by the defendants, that the *Wheal* Brothers' Mine had not only paid its way from the commencement of the workings in *January* 1832, but that a dividend, at the rate of 18*l.* per cent. per annum, had been paid for the month of *March* then last on the *agreed* capital of 100,000*l.*, and that the like dividend had been declared payable on the 15th day of *July* 1835, for the month of *April* then last, and that there were assets in hand for the month of *May*; that it was the opinion of the mining agent that when the lode should have been pierced ten fathoms below the then present bottom of the said mine, which would be done in about three months then next, a dividend from 30 to 40 per cent. per annum would be produced; that the machinery and three water engines then already erected were equal to the draining of the mine seventy fathoms, that there were offices, sheds, and all convenient buildings for working the mines and assaying

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the ores, &c. &c., with all necessary apparatus furnishing an entire mining establishment, all paid for out of the produce of the mine, and without any call having been made on account of the capital of the company; and the defendants on the 28th of *July* 1835, and on divers other days and times, did also falsely and fraudulently, and deceitfully cause to be printed, and to be represented in the conditions annexed to the scrip-certificates so issued and delivered by defendants, that it was very improbable that any call would be necessary, as the defendant had funds in hand, arising from the working of the mine, to declare dividends for the months of *April* and *May* 1835, and that they would retain funds for the expences of the working of the same mine before a dividend should be declared. The count then stated, as in the first count, that the defendants had advertised a dividend of 18 per cent. (a) on the subscribed capital of 100,000*l.* to be paid 31st of *August* 1835, for the month of *May* 1835, and similar dividends to be paid on 30th of *September*, 31st of *October*, 30th of *November*, and 31st of *December* 1835, and that in future the dividends would be quarterly instead of monthly; and that the defendants, as such directors, fraudulently paid such dividends to divers shareholders, and indorsed such payments on the scrip-certificates. The count then set out the report laid by the defendants before the shareholders attending at the *April* general meeting 14th of *April* 1836, in which the nonpayment of the quarterly dividend on the 31st of *March* was attributed to circumstances not inconsistent with the productiveness of the mine, and alleged that the statement of the accounts of the company, so given in and read before the shareholders attending at the meeting of 14th *April* 1836, did falsely, fraudulently,

(a) i. e. $1\frac{1}{2}$ per cent. per month, being at the rate of 18 per cent. per annum.

and deceitfully state and represent that the amount of ore raised, gotten, and sold, from and out of the mine from the time of the commencement of the company in *July* 1835, to the 31st of *March* 1836, amounted to 5847*l.* 12*s.* 8*d.*, and that the amount of ores on hand, raised and gotten from the mine up to the end of *September* 1835, less one-eighth for lord's dues, amounted in value to 3500*l.*, together amounting to 9437*l.* 12*s.* 8*d.*, and that to the end of *September* 1835, the whole amount of the monthly cost and expenditure for the mine from the time of the commencement of the company in *July* 1835, and of the six pretended dividends so alleged to have been paid, and of cash paid for lord's dues in the whole amounted to 11,323*l.* 2*s.* 10½*d.*, leaving the company in debt in a large balance to wit, 1975*l.* 10*s.* 2½*d.*, and that the amount of the monthly cost and expenditure for the mine from *September* 1835 to *March* 1836, together with the said balance of 1975*l.* 10*s.* 2½*d.* amounted together to 3438*l.* 14*s.* 6½*d.*, which sum was then debited to and against the company. And that the defendants on 1st *June* 1836, and on divers other days and times between that day and the purchase by the plaintiff of shares in the company as thereafter mentioned, did also fraudulently and deceitfully produce, shew, and give to the plaintiffs a printed copy of the report, and also of the statement of the accounts so given in, read, and laid before the shareholders attending, &c., and did also then falsely, fraudulently, and deceitfully produce, and shew to the plaintiff divers false and untrue, and pretended weekly reports, by them alleged to have been received from the mine, and which reports represented the mine to be in a most flourishing condition, and yielding large and profitable quantities of ores; and the defendants on the several days and times last aforesaid, did also falsely, fraudulently, and deceitfully produce, and shew to the plaintiff, divers

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— in relation to the mine, and of the amount and value of
SHREWSBURY the ores raised, &c., from which accounts it appeared
v. that the amount and value of &c. was very considerable,
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person holding, or buying shares. That the plaintiff
having seen and read divers of the scrip-certificates re-
presenting divers of the shares or interests in the com-
pany, and the statements, representations, indorsements,
and memorandums printed and written on the face and
back of such last mentioned scrip-certificates, and having
also seen and read the several reports and statements of
accounts, and also the several advertisements, and
having read the said printed report and statement of the
accounts of the company so produced and shewn, and
given to him by the defendants; and confiding in the
several last mentioned false, fraudulent, and deceitful
statements, representations, indorsements, and memo-
randums, conditions, advertisements, and reports, and
statements of accounts, and believing the same to be
true and correct, and to have been made and published
by the defendants on good and sufficient foundation,
and having no reason or ground to suspect to the con-
trary, afterwards on 1st *June* 1836, and on divers other
days and times, &c., was induced to and did go into
the public market and purchase and buy divers, to wit,
eighteen scrip-certificates, — stating the purchases, and
alleging, in separate and distinct averments, that each
representation was false, within the knowledge of the
defendants; and stating special damage as in the first
count.

The defendants *Blount, Caffary, Harrison, and Heathorn* pleaded; 1st, not guilty, to the whole de-
claration; then as to the first count; 2dly, that the
defendants and *Malacky, &c.*, had not formed them-
selves into a company, and the same was not an existing

company for the purposes in that count mentioned; 3dly, that the defendants had not become and were not the directors of the said company, with such qualification, and subject to such conditions, as in the first count mentioned, nor were the affairs of the company under the sole or entire control of the defendants as such directors, *modo et formâ*; 4thly, that the scrip-certificates in the first count mentioned, representing the shares or interest in the company of and belonging to the defendants, were not, nor were any of them, in the public market for sale, at the times, or in manner and form as in the declaration alleged; 5thly, that the plaintiff was not induced to go, and did not go, into the public market, and did not purchase or buy the said scrip-certificates or any of them, *modo et formâ*; 6thly, that at the time in the declaration mentioned, the said shares or interests of the holders of the said scrip-certificates were not, nor were any of them, in the public market for sale at such quotation or price per share, nor was the amount of each share quoted, stated, or represented in the public market as having been then fully paid on or subscribed, *modo et formâ*; 7thly, that the plaintiff, before and at the time he purchased the several scrip-certificates representing the said shares or interests in that count mentioned, and before and at the time of his sustaining the alleged damage, had notice of and well knew the true state of facts as to the several matters and things, in respect of which the defendants are in that count alleged to have made such false, fraudulent, and deceitful representations, statements, reports, indorsements, memorandums, dividends, and payments, and to have been guilty of the false, fraudulent, and deceitful conduct, and grievances in that count mentioned, *modo et formâ*; 8thly, that the company or partnership in that count mentioned, during all the time therein mentioned, and before and at the time

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1841. when the plaintiff bought the said scrip-certificates in
 ——— that count mentioned was, and hence hitherto has been
 SHERBURN v. and still is, an alleged company or partnership illegally
 Blount, presuming to act as if they were and are a corporate
 body, as taking upon themselves as such, and without
 any lawful authority, and without any charter from the
 Crown for that purpose, to raise a transferable and
 assignable stock and interest to a large amount, (to
 wit), to the amount of 100,000*l.*, to be divided into a
 large number of shares, (to wit) 5000 shares, which
 shares were to be and are transferable and assignable,
 at the pleasure of such holders thereof, to any person or
 persons at the pleasure of such holder, and without any
 control or restriction whatsoever; whereof the plaintiff,
 during all the time in the first count mentioned, had
 notice, and so bought the said scrip-certificates and
 shares being part of the said 5000 shares, in order to
 become a shareholder in such illegal company.

To the second count: 9thly, that the defendants
 and the said *J. M.*, *T. M.*, *J. H.*, and *T. H.*, and the
 said other persons mentioned in that count, had not
 formed themselves into a company, and the same was
 not an existing company, for the purposes in the second
 count mentioned, *modo et formâ*; 10thly, that the de-
 fendants in this suit had not become, and were not, the
 directors of the company, with such qualifications, and
 subject to such conditions as in that count is mentioned,
 nor were the affairs of the company under the sole or
 entire control of the defendants as such directors,
modo et formâ; 11thly, that *Blount*, *Caffary*, *Harrison*,
 and *Heathorn* were not present at the meeting, and did
 not give in, or cause to be read, or laid before the
 shareholders present, such report as in the last count
 mentioned, *modo et formâ*; 12thly, that the scrip-cer-
 tificates in the last count mentioned, representing the
 shares or interests of and in the company, of and be-

longing to the defendants were not, nor were any of them in the public market for sale at the times, or in manner and form, &c.; 13thly, that the plaintiff was not induced to go, and did not go, into the public market, and did not purchase or buy the scrip-certificates in the last count mentioned, or any of them, *modo et formâ*; 14thly, that at the time in the declaration mentioned, the said shares or interests of the holders of the said scrip-certificates were not, nor were any of them, in the public market for sale at such quotation or price per share, nor was the amount of each share quoted, stated, or represented in the public market, as having been then fully paid up or subscribed, *modo et formâ*; 15thly, that the plaintiff before and at the time he purchased the several scrip-certificates, representing the said shares or interests in the last count mentioned, and before and at the time of his sustaining the alleged damage, had notice of, and well knew, the true state of facts as to the several matters and things, in respect of which the defendants are, in the last count, alleged to have made such false, fraudulent and deceitful representations, statements, reports, indorsements, memorandums, dividends, advertisements, and payments, and to have been guilty of the false, fraudulent, and deceitful conduct, and grievances, in the last count mentioned, *modo et formâ*; 16thly, that the company or partnership in the second count mentioned, during all the time therein mentioned, and before and at the time when the plaintiff bought the scrip-certificates in that count mentioned, was and thence hitherto has been, and still is an illegal company or partnership, illegally presuming to act as if they were and are a corporate body, and taking upon themselves, as such, and without any lawful authority, and without any charter from the Crown for that purpose, to raise a transferable and assignable stock and interest, to a large amount, to wit, to the amount of 100,000*l.*, to be

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1841. divided into a large number of shares, to wit 5000
 — shares, which shares were to be transferable and assign-
 BREWSTER able from time to time by the holders thereof to any
 v. person or persons at the pleasure of such holders, and
 BLOUNT. without any control or restriction whatsoever; whereof
 the plaintiff during all the time in that count mentioned
 had notice, and so bought the said scrip-certificates and
 shares, being part of the said 5000 shares, in order to
 become a shareholder in such illegal company. Verifi-
 cation.

The defendants *Grout* and *Sapte* pleaded in the same manner, except that in their pleas the two traverses contained in the third plea of the other defendants, were stated in separate pleas; as were also the traverses contained in the tenth plea of the other defendants.

The replication took issue upon the pleas alleging the illegality of the company, viz. the 8th and 16th pleas of *Blount*, *Caffary*, *Harrison*, and *Heathorn*, and the 9th and 18th pleas of *Grout* and *Sapte*; and joined issue upon the other pleas.

1840. At the trial before *Erskine* J., at the sittings after last
 Dec. 1. *Michaelmas* term, the defendants *Blount*, *Caffary*, *Harrison*, and *Heathorn*, and the defendants *Grout* and *Sapte* severed in their defence, as they had done in pleading; and they were represented by different counsel.

G. W. Harrison, the son of the third defendant, — who had been appointed secretary to the mine in *July* 1835, shortly after the formation of the company, which office he held until the discontinuance of the working of the mine in *November* 1837, when he handed over the documents in his possession to the defendants, — was examined as to the proceedings of the company. The defendants had, in 1835, purchased from *Malachy*, upon his representation of the produce and the property of the mine, 450 shares, at the price of

20*l.* a share, which, the assumed value of the mine being 100,000*l.* and divided into 5000 shares, would give a nominal value of 5*l.* per share; and the defendants did not appear to have parted with any of such shares, though they had at one time risen to the price of 35*l.* per share. The purchase of these 450 shares was proved by the production of a paper which had been delivered to the witness *Harrison* by his father.

It was objected by *Kelly* and *Manning* Serjt., for the defendants *Grout* and *Sapte*, that a statement by the defendant *Harrison* was not admissible in evidence, inasmuch as they ought not to be prejudiced by statements which he might choose to make. The learned judge overruled the objection, on the ground that, although to fix all the defendants, it was necessary to bring the charge home to each of them; yet, as upon this record, *Harrison* alone might be found guilty, evidence of an act done by him could not be excluded.

Books containing entries of minutes of the proceedings of the company were produced by the defendants in pursuance of notice, as was also a co-partnership deed, executed by all the shareholders in *July* 1835, and an assignment of the lease of the mine from *Malachy* to *Blount*, *Heathorn*, and others, who executed a declaration of trust in favour of the new partnership. Six monthly dividends of 1½ per cent. each, being at the rate of 18 per cent. per annum, upon the nominal capital of 100,000*l.*, (amounting to 9000*l.*, with the exception of 57*l.* left outstanding,) were paid by their direction to the shareholders, out of funds supplied by *Malachy*, as produced by the mine, though a large portion of the 9000*l.* was in reality taken, partly out of the money which *Malachy* had obtained from the defendants and others upon sales of shares in the mine, and partly from the proceeds of accommodation bills. A book kept by *Malachy* containing entries of the disburse-

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ments made for working the mine, called the cost-book, and also a book containing an account of the sale of ores, were received from *Malachy* in 1837, by *G. W. Harrison* as secretary. These books were offered in evidence by the plaintiff, as shewing that the defendants either knew, or had the means of knowing, the real character of the mine.

The learned judge was of opinion that, as the entries in these books were not proved to be made by *Malachy* in the course of his agency, they could not be received in evidence, but that if the books could be shewn to have been kept at the mine whilst *Malachy* was acting as mine agent to the defendants, the entries therein made by *Malachy* and his clerk might be considered as the entries of the defendants.

Upon cross-examination, *G. W. Harrison* stated that, from the representations made by *Malachy* to the defendants, he entertained the highest opinion of the concern, and with the concurrence and by the persuasion of his father, gave up a commission in the *Madras* artillery, for the purpose of taking the office of secretary of this and two adjoining mines. He was then asked as to a conversation between his father and his co-defendant *Grout*, in which the latter had introduced and recommended the concern to the former. It was objected on the part of the plaintiff, that any conversation between two of the defendants could not be evidence against the plaintiff. The learned judge, however, said, "Although the evidence is of very trifling value, I should put the plaintiff to the risk of a motion for a new trial were the evidence excluded. If the only question between these parties were, whether the representations stated in the declaration were made by the defendants, and whether they were true, then any conversation between the defendants would be inadmissible. But here the plaintiff is bound further to shew that

the representations were *fraudulent*. Another main question in this cause will probably be the *bona fides* with which the representations were made. Every information which the defendants received before they made such representations would be matter to be taken into consideration with reference to that point. Each defendant must be found guilty in respect of the part which he took in the transaction. All the defendants may have joined in the representations, whilst some of them may have not known that they were false. *Grout*, who had been an original shareholder, must have known whether he had received any profits from the mine, and would be, therefore, a proper person to refer to."

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The objection being overruled, the witness stated, that before the company was formed, he had more than once accompanied his father to *Grout's*. *Grout* stated that he had bought shares in an adjoining mine in consequence of the favorable opinion which he entertained of this mine, an opinion founded upon statements made by *Malachy*, which corresponded with the representations set out in the declaration. The witness had also been present when similar representations had been made to the other defendants, who thereupon all took shares. *Harrison*, besides his original share, bought shares at a premium which he still held. The plaintiff then called other witnesses to negative the representations made by the defendants, but was at last under the necessity of calling *Malachy*, who however, not only stated that he had made the representations *seriously* to the defendants, but swore that the representations were substantially true. He admitted that the dividends had been paid out of moneys supplied by himself; but he stated that he considered the mine (which had ceased to be worked since 1837) was really worth 70,000*l.*, and that he could have sold the mine for that sum in 1834.

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A previous lessee of the mine, (the name of which had been subsequently changed), proved that he had abandoned the mine in 1834, after expending 200*l.* or 300*l.* upon the adventure.

No evidence was given on the part of the defendants beyond that which was obtained from the cross-examination of the witnesses called by the plaintiff.

The learned judge told the jury, that the questions for their consideration were, whether the plaintiff had sustained damage by reason of a purchase of shares made by him upon the faith of representations held out by the defendants, and known by them to be unfounded in fact. That the jury in finding a verdict for the plaintiff must be satisfied, 1st, that the representations set out in the declaration were made by the defendants, or some of them; 2dly, that these representations were false; 3dly, that the defendants, at the time they made such representations, knew them to be false; 4thly, that the plaintiff advanced his money believing the representations in the scrip-certificates to be true; 5thly, that, as alleged in the second count, the plaintiff, in advancing his moneys, confided not only in the scrip-certificates, but also in the report. With respect to the allegation that the mine had paid its way, his lordship observed, that a public prosecutor appearing on behalf of the Crown, is bound to produce every tittle of evidence bearing on the charge; whereas a plaintiff in a civil action is only required to produce that which is sufficient to make out his case. But that here it lay on the plaintiff to negative the statement, not on the defendants to prove that it was correct; and that there did not appear to be any evidence that in *July* 1835, the mine had not paid its way. That as to this allegation no witness was examined except *Malachy*, who stated it to be true. That with respect to the state-

ment respecting the 100,000*l.* *agreed* capital, it was obvious, that it could not be meant that 100,000*l.* had been *subscribed*. That the statements made by the defendants shewed great want of caution, but that the question for the consideration of the jury was, whether their statements were made fraudulently. That if the defendants had brought their own shares into the market, there would have been some ground for suspecting that the representations had been made with a view to their own advantage; but that there was no evidence of any shares being sold except by *Harrison*, and he had bought more than he sold. That upon the second count, the jury were to consider whether the statements certified in the report were untrue, and known to the defendants to be untrue. That there was no evidence of the plaintiff's having seen the report, or the accounts mentioned in the second count. That the plaintiff was not bound to shew that his purchases were made from the persons named in the declaration, but that it was for the jury to say, whether they were made under a belief that the representations were true, taking into consideration that when the plaintiff bought, the shares had not kept up at the high price of 30*l.* to 40*l.* a share, but had fallen considerably below the nominal price of 20*l.* That he was of opinion, that supposing the allegations to be proved to the satisfaction of the jury, the company was illegal; and that all the evidence in the case shewed that the shares passed from hand to hand, and were made payable to bearer, as alleged.

That supposing the plaintiff was entitled to recover, the question would arise as to the amount of damages; and that the plaintiff should have proved that he had sold the shares at a loss, or, if he retained them, he should have shewn the reduction in value.

The jury having found a verdict, generally, for the

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The jury having found a verdict, generally, for the

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1841. defendants, the learned judge gave the plaintiff leave
 ——— to move to enter a verdict upon the issues taken
 SHREWSBURY on the pleas setting up the illegality of the com-
 v. pany. (a)
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Halcombe Serjt., now moved for a new trial, 1st, on the ground of misdirection; 2dly, that, as to some of the defendants, the verdict was against the evidence; 3dly, that evidence had been rejected which ought to have been received; and, 4thly, that evidence had been received which ought to have been rejected.

The principal question is, whether the defendants are not liable for damage sustained by the plaintiff in consequence of false representations made to him by them, although they may have been ignorant, at the time of making such representations, that they were false. It is submitted that the defendants are answerable for putting forth false representations, whether knowingly or not, by which other persons are induced to purchase shares in this mine. [*Tindal* C. J. The contrary is established by all the modern cases. *Bosanquet* J. Do you controvert the doctrine laid down in *Haycraft v. Creasy*? (b)] It was the duty of the defendants, having ample means of knowledge, to ascertain whether the representations which they held out to the public were true. In *Cornfoot v. Fowke* (c), Lord Abinger C. B., observes: "The warranty of a fact which does not exist, or the representation of a material fact contrary to the truth, are both said in the language of the law, to be fraudulent, although the party making them suppose them to be correct." His lordship referring to *Pawson v. Watson* (d), adds, "Lord Mansfield lays it down generally, that in a representation to

(a) *Ante*, 491. 493.

(b) 2 *East*, 92.

(c) 6 *M. & W.* 358.

(d) *Cowp.* 785.

induce a party to make a contract, it is equally false for a man to affirm that of which he knows nothing, as it is to affirm that to be true which he knows to be false. This maxim is neither negatived nor qualified by the doctrine laid down in that class of cases derived from *Pasley v. Freeman*. The plaintiffs in those cases sought to charge a party with damages for stating that which he believed to be true, though he did not know it to be so in answer to enquiries made by the plaintiff respecting the credit of a third person. There the defendant had no end to gain, no interest in the event, no motive to deceive; he was not one of the *dramatis personæ* in the construction of any contract." [Erskine J. The issue raised upon the allegation, that the plaintiff purchased upon the faith of the scrip-certificates, was expressly left to the jury, and they were to say, whether the plaintiff purchased on the faith of the representations, and without knowledge of the truth of the facts. Tindal C. J. Before you can come to the point of law, you must get rid of the verdict of the jury upon the fifth issue. A prudent man could not believe that this mine was paying dividends at the rate of 18l. per centum per annum, when he paid no more than 12l. for a 20l. share.] If it was the duty of the defendants, having the means of knowledge to ascertain whether the dividends were paid out of the proceeds of the mine, and they falsely represented that they were so paid, they are guilty of a wrong, and are bound to make satisfaction to the plaintiff for the loss which he has sustained in consequence of that wrong, and they ought not to be allowed to shelter themselves under an allegation of ignorance. All judges seem to agree in opinion that when the party has an interest in the false representation which he makes, he is liable though the misrepresentation was made innocently; *Pawson v. Wat-*

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1841. *son (a); Devaux v. Steinkeller (b), Dobell v. Stevens (c), Haycraft v. Creasy (d), Lord Bacon's Maxims (e),*
 SHREWSBURY *Schneider v. Heath (g), Pasley v. Freeman (h), Bailey v.*
 v. *Merrell (i), Com. Dig. Action on the case for a de-*
 BLOUNT. *ceipt, (A 1.). [Maule J. The defendants are not the*
vendors; the plaintiff buys of some other person. These
are representations made upon some other occasion.
Tindal C. J. You cannot bring it to a case of warranty;
the defendants not being the vendors. It cannot be
said, warrantizando vendiderunt. Maule J. It is clear
that no action upon any contract could have been
brought here. Tindal C. J. You cannot put the case
higher than that these were representations made, not
by parties to the contract with the plaintiff, but by
parties generally interested in the subject matter of such
contract.] Foster v. Charles. (k) Williamson v. Allan-
son (l) is an important case in point. It is submitted
that the scrip-certificates amounted to a warranty; but
if not, the case should be considered as falling within
the same rule. (m) [Erskine J. At the meeting in April
a report was made which was afterwards printed and
circulated.] There was no evidence that the plaintiff
knew of the report. (n)

Evidence was improperly rejected. Books containing an account of the disbursements and of the sales of ores were tendered on the part of the plaintiff, as books kept by *Malachy* under the directions of the defendants, but

- (a) *Cowp.* 785.
- (b) 6 *New Cases*, 84., 8 *Scott*, 202.
- (c) 3 *B. & C.* 623., 5 *Dowl. & R.* 490.
- (d) 2 *East*, 92.
- (e) *Regula*, 7, p. 31.
- (g) 3 *Campb.* 506.
- (h) 3 *T. R.* 57.
- (i) 3 *Bulst.* 94.
- (k) 6 *Bingh.* 396., 7 *Bingh.* 105., 4 *M. & P.* 61. 741.

- (l) 2 *East*, 446.
- (m) And see *Wood v. Smith*, 5 *Mann. & Ryl.* 124.
- (n) In the second count the report is set out, *vide supra*, 488. The information communicated by that report, however, would not be evidence against the plaintiff of knowledge, so as to affect his right to recover under the first count.

the learned judge refused to receive them. [*Erskine J.* The objection was, that there was no evidence that these books had been kept at the mine at all. *Harrison* the secretary, first saw the books in 1837, when they were sent up by *Malachy*, as books made out by himself and his clerk. I thought that before they could be received in evidence, it ought to be shewn that they were kept at the mine. Though the books were in the hand-writing of the agent *Malachy* and his clerk, it was not shewn at what times the entries therein were made. For any thing that appeared, the books might have been made up afterwards.]

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The learned judge received evidence of conversations between some of the defendants themselves. (a) [*Erskine J.* Not as evidence of facts stated in those conversations, but as evidence that certain representations had been made to some of the defendants by persons who were acquainted with the facts.] It would be mischievous to allow defendants in actions of tort, to give evidence of that which one defendant has said to another.

TINDAL C. J. I shall give no opinion upon the main question that has been argued before us, with respect to the alleged misdirection, because it is unnecessary to consider it so long as the verdict upon the issue — whether the plaintiff purchased his shares on the faith of the representations made by the defendants, — stands for the latter. The jury have found that the plaintiff did not purchase his shares in consequence of such representations; and before we set aside their verdict we must be satisfied that they have come to a wrong conclusion. It appears, that in 1835, the scrip-certificates were issued at the nominal value of 20*l.* per share, giving, as usual, a glowing account of the speculation. The plaintiff bought certain shares in *July* and *August*

(a) *Ante*, 496.

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1836, at 12 $\frac{1}{2}$. per share. It was a question for the jury, whether the plaintiff had been induced to make his purchase on the faith of the representations contained in the scrip-certificates. One point for their consideration was the nominal value of the scrip-receipts as compared with their market price. The fact that the plaintiff purchased 20 $\frac{1}{2}$. shares at 12 $\frac{1}{2}$. each, ought to have put a prudent person upon inquiring as to whether the undertaking remained in the state in which it was represented to be at the time when the scrip was first issued. It is to be observed, that the directors had no power to recall the scrip; for, when once issued, it became the property of the holders. In *April* 1836, a public meeting of the shareholders was held, and a report was published which tended greatly to overthrow the flattering statements made in the scrip-receipts. There was undoubtedly no evidence that the report came to the knowledge of the plaintiff (a); but the jury had a right to consider whether an inquiry would not have satisfied the plaintiff, that no dependence was to be placed on the representations contained in the scrip-certificates. I can see no objection to the jury coming to the conclusion, that if the plaintiff had acted as a reasonable man would have done, he could not have failed to ascertain the true state of the mine. On the whole, I am of opinion, that the jury might very fairly arrive at the belief that the plaintiff did not purchase his shares on the faith of the representations made in the scrip-certificates. I wish to urge the fact that the plaintiff was an attorney no further than this, — that his knowledge of the world and experience must have taught him how little reliance was to be placed on representations of such a nature; and that he was likely to use the same discretion in his own affairs which he would employ in transacting the business of his clients.

(a) *Ante*, 502. (n)

The objection that the learned judge was wrong in rejecting the books said to have been kept by *Malachy*, has received its answer during the course of the argument. To render them admissible, some evidence should have been given that the books were kept by *Malachy* in the course of his employment as agent for the defendants. At the time when they were rejected by the learned judge, there was clearly nothing to connect them with the defendants.

Another objection is, that the conversations between the defendants *Grout* and *Harrison*, and between *Grout* and *Malachy*, with reference to the state of the mine, ought not to have been received on the part of the defendants. Undoubtedly, those conversations were not evidence of the truth of the facts stated. But when it is considered what the issue was, and that the question which the jury were called upon to decide, was, whether or not the defendants had acted with bona fides, it seems to me that the conversations were admissible, and that the information which the defendants had received with respect to the state of the mine, went to the root of the matter into which the jury had to inquire. The learned judge, who tried the cause, has expressed no dissatisfaction with the verdict, and I am therefore of opinion that it ought not to be disturbed.

BOSANQUET J. I also think that there is no ground for saying that the jury have come to a wrong conclusion upon the question, whether the plaintiff purchased his shares upon the faith of the representations contained in the scrip-certificates. It appears that the plaintiff did not buy his shares until a twelvemonth after the scrip-certificates were issued. Many changes must have occurred in the interval; and the great depression which had taken place in the price of the shares, would naturally put any one upon his guard

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against trusting too much to the statements contained in the scrip-receipts. In my opinion, the jury might very properly come to the conclusion, that the shares had not been bought upon the faith of such statements, and that the plaintiff must have known that the company were not then in a condition to pay a dividend of 18 per cent.; the more especially as he was a professional man; which fact might have some weight in influencing their decision.

With respect to the rejection of the books, it was necessary, in order to make them evidence, to shew that they were kept by *Malachy* in his employment by the company; but when the books were rejected, and up to the time when *Malachy* himself was called as a witness, no such proof had been given.

With regard to the admissibility of the conversations, it was material, in order to ascertain whether the defendants had acted *bonâ fide*, to know what information they had received as to the state and the prospects of the mine.

MAULE J. I also think that this verdict should not be disturbed. There was clearly evidence from which the jury might infer, that the plaintiff did not buy his shares on the faith of the representations made in the scrip-certificates; and if I had been on the jury, I should have come to the same conclusion. It therefore is unnecessary to decide the main question which has been argued; namely, whether, in order to render the defendants liable to this action, they must have *known* the representations to be false; except, so far as it is material to consider the point with reference to the admissibility of the conversations. As regards the rejection of the books, — at the time they were tendered nothing was shewn, except that they had been received from *Malachy*, and were in his handwriting. There was no

proof that they were the books of the company; and, though such proof was subsequently given, they were not again tendered in evidence. With respect to the statement made by the defendant *Grout* to the defendant *Harrison*, I am of opinion that it was admissible, — supposing that it was a question upon the record, whether each of the defendants acted bonâ fide, and that it would be an answer to the action, to shew that he had good reason to believe the representations which he had made. Whether the proof of that fact was material, depends in some degree upon the main question in the case. I have no hesitation in concurring with the rest of the court to this extent, — that it would amount to a defence to the present action, that although the representations were not conformable to fact, they were made under a belief, reasonably well grounded, of their truth. The tendency of the conversations was, to shew that, at the time the defendants made the representations contained in the scrip-certificates, they entertained a well founded belief that they were true; and I think that the conversations were admissible for that purpose.

ERSKINE J. I see no reason to be dissatisfied with the verdict. It appeared to me that the defendants, at the time they made the representations, really believed in their truth. Perhaps it would have been as well if I had put it more distinctly to the jury to consider, whether the defendants honestly believed the representations to be true; but that was in substance left to them. And as the jury found that the plaintiff did not purchase his shares on the faith of such representations, the further consideration of this point becomes unnecessary.

Rule for a new trial refused; rule granted to shew cause why the verdict should not be entered for the plaintiff upon the eighth and ninth issues.

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 ———
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Manning Serjt. now shewed cause. The rule is incorrect in form. The leave was reserved as to the issues relating to the illegality of the company. This would apply not to the eighth and ninth issues mentioned in the rule obtained by the plaintiff, but to the issues joined upon the replications to the eighth and the sixteenth or last pleas of the defendants *Blount, Cuffary, Harrison, and Heathorn*, and to the issues joined upon the replications to the ninth and the eighteenth or last pleas of the defendants *Grout and Sapte*; and as this is merely a question as to the costs of these issues, about which the defendants, under all the circumstances, are wholly indifferent, their instructions are, to consent to the rule. It may, however, be proper to suggest that, as the jury found the facts out of which the alleged liability arose, for the defendants, the plaintiff is not entitled to a *verdict* upon these issues, but should have moved for judgment *non obstante veredicto*.

The court, however, intimated an opinion, that a judgment *non obstante veredicto* cannot be entered where there is a verdict for the defendant upon a good issue going to the whole cause of action (*a*); and *Halcombe* Serjt. acquiescing in the alteration proposed by *Manning* Serjt. in the form of the rule, as to the particular issues to be entered as found for the plaintiff.

Rule absolute accordingly.

(*a*) The ordinary form of a judgment *non obstante veredicto* (which see 2 *Roll. Abr.* 99., 14 *Fin. Abr.* 585.), appears to be inapplicable to such a state of the record. It does not, however, seem necessarily to follow that upon a plea, true in fact but bad in law, a verdict negating the *truth* of the plea ought

to be entered. And see *Broadbent v. Wilks, Willes*, 360.366.; *S.C. in error*, 1 *Wils.* 63.

The same difficulty appears to have really existed upon the state of the pleadings in *Clears v. Stevens*, 8 *Taunt.* 413.; 2 *B. Moore*, 464.; but the point is not noticed. *Vide post*, 547, 548.

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TREGO v. TATHAM.

Jan. 23.

ASSUMPSIT on a bill of exchange, for money had and received, and upon an account stated.

Special demurrer to the declaration on the ground that the promise which followed the *indebitatus* allegation embraced *all* the preceding sums instead of being limited to those in the *indebitatus* counts.

The demurrer, which should have been entitled "*Tatham ats Trego*," was entitled and indorsed, "*Trego ats Tatham*;" and it was entitled of, and delivered on, the 19th of *November*. On the 20th, the plaintiff signed judgment for want of a plea. Later in that day the defendant's attorney demanded a joinder in demurrer; when he was informed that on account of the informality of the demurrer, judgment had been signed. On the 21st the defendant's attorney obtained and served a summons returnable on the 23d, for setting aside the judgment. On the 23d the plaintiff's attorney not attending at the judge's chambers, a fresh summons was taken out returnable on the 25th. On the 24th the rule to compute was made absolute upon an affidavit of service, no cause being shewn. On the 25th *Adams Serjt.* obtained a rule calling upon the plaintiff to shew cause why the rule to compute should not be discharged with costs, on the ground that it had been irregularly made absolute pending the summons to set aside the judgment.

It is irregular to move to make a rule absolute to compute pending a summons to shew cause why the judgment should not be set aside.

Channell Serjt. now shewed cause. The ground of demurrer assigned was frivolous, and was evidently intended for delay. The court therefore will not assist the defendant in his attempts to relieve himself from the consequences of a step which he evidently took

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for no other purpose than that of introducing some confusion into the cause. It is submitted that a summons issued by a single judge cannot have the effect of arresting the course of a proceeding commenced by a rule of the whole court. In shewing cause against a rule to compute, the defendant cannot take advantage of any irregularity in the judgment, *Marryat v. Winkfield*. (a) The defendant instead of taking out a summons should have made a direct application to the court.

Adams Serjt. in support of the rule. It is for the convenience of the court that applications which were formerly made to the full court are now disposed of by a judge at chambers. The practice must be discontinued if it be held that the service of a judge's summons is no stay of proceedings.

TINDAL C. J. A summons, from the time at which it is returnable is a stay of proceedings, at least upon the parties. There is no necessity for setting the authority of a judge against the authority of the court.

So many points of litigation have been raised on both sides in this case, that I think each party should pay his own costs.

ERSKINE J. The summons appears to operate by way of injunction.

Rule absolute, without costs.

(a) 2 *Chitt. Rep.* 119.

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CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Hilary Vacation,

IN THE

FOURTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in banc during this vacation were,

TINDAL C. J. MAULE J.
BOSANQUET J.

ATHERSTONE v. BOSTOCK.

Feb. 3.

ASSUMPSIT. The first count of the declaration stated that the plaintiff, before and at the time of the making of the agreement thereafter mentioned, was lawfully possessed of a dwelling-house, the rooms on the first floor whereof were furnished with and contained furniture, &c. necessary for the occupation thereof; that thereupon, to wit, on the 1st of *March*, A. D. 1839, by a certain agreement then made by and between the plaintiff of the one part, and the defendant of the other part, it was agreed by and between the plaintiff

A. writes to B.; "I hereby agree, according to our conversation of last evening, to pay you fifty guineas for the occupation of your first floor furnished, from March 4. to

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September 4.
I also agree
either to oc-
cupy the said
rooms from
September 4.
to December
4., furnished,
on the same
terms, that is
to say, twenty-
five guineas
for the three
months, or
take them
unfurnished
at the rate of
eighty guineas
per annum."

Held, that *B.*
may declare
as upon an
agreement, —
to pay him

for the occupation of the first floor furnished, from *March 4.* to *September 4.*, the sum of 52*l.* 10*s.*, and either to occupy the rooms from *September 4.* to *December 4.* furnished, on the same terms, that is to say, 26*l.* 5*s.* for three months, or take the same rooms unfurnished for the said three months at the rate of 84*l.* per annum; and that the words "at the rate of eighty guineas per annum" do not imply a contract for a year.

To prove this contract, under a plea of non assumpsit in an action by *B.* against *A.* for refusing to occupy the rooms furnished till *December 4.*, or to take them unfurnished after the three months at the rate of 84*l.* per annum, *A.*'s letter was put in stamped with a 30*s.* stamp. To shew that the real contract between the parties was for a yearly tenancy of the unfurnished rooms, *A.* produced a contemporaneous letter written to him by *B.*, unstamped, in which *B.* stated that he agreed to let the rooms *by the year*. Held, that this letter was properly rejected, inasmuch as if it created a new or substituted contract, it required a 30*s.* stamp, and if it formed part of the original agreement, a 35*s.* stamp was required for some one of the letters, under the general stamp act, 55 G. 3. c. 184. sched. Part I. "Agreement." (a)

and the defendant in manner and form following; that is to say, the defendant agreed to pay the plaintiff for the occupation of the said first floor furnished as aforesaid from the 4th of *March* to the 4th of *September* 1839, the sum of 52*l.* 10*s.*; and the defendant also agreed either to occupy the said rooms from the 4th day of *September* aforesaid to the 4th day of *December* 1839, furnished, on the same terms, that is to say, 26*l.* 5*s.* for the three months, or take the said rooms unfurnished for the said three months at the rate of 84*l.* per annum. And the plaintiff then thereby agreed that the defendant should have and occupy the said first floor and rooms for the times and on the conditions and terms aforesaid, furnished as aforesaid, from the said 4th of *March* to the said 4th of *September*, and furnished or unfurnished as aforesaid from the said 4th of *September* to the said 4th of *December*. That the defendant then undertook and then promised to perform the said agreement. Averment: that although the plaintiff from the time of the making of the said agreements, hitherto performed all things therein contained on his part to be performed and suf-

ferred, and permitted the defendant to have and occupy the said first floor furnished as aforesaid from the said 4th of *March* 1839, to the said 4th of *September* 1839, for the sum and on the conditions and terms in that behalf in the said agreement mentioned. And although the plaintiff before the said 4th of *September*, to wit, on the 3d of *September* 1839, and from thence until and to the said 4th of *December* 1839, was ready, and willing, and tendered, and offered to, and requested that the defendant would have and occupy the said rooms from the said 4th of *September* 1839, to the said 4th of *December* 1839, furnished or unfurnished as aforesaid, and on the conditions and terms in that behalf in the said agreement mentioned; yet the defendant had not performed his said agreement, or occupied the said rooms either from the said 4th of *September* to the said 4th of *December*, furnished at 26*l.* 5*s.* for the said three months, or taken the said rooms unfurnished for the said three months at the said rate of 84*l.* per annum, or paid the plaintiff the said sum of 26*l.* 5*s.*, or at the rate aforesaid. The declaration contained also a count for use and occupation.

The original pleas to this declaration were: first, non assumpsit to the whole declaration: secondly, to the second count, payment.

In the replication, the plaintiff joined issue upon the first plea, and took issue upon the second plea; and the defendant joined issue.

Afterwards the defendant obtained a judge's order for leave to plead two additional pleas to the first count, viz., secondly, that before any breach of the agreement, the plaintiff and the defendant had agreed to rescind it; thirdly, that before any breach, the plaintiff and defendant had agreed upon a weekly tenancy at two guineas a week, in full discharge of the agreement.

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The following particulars of the plaintiff's demand were delivered : —

“ This action is brought to recover such damages as the plaintiff may be entitled to claim under the first count of the declaration delivered in this cause, and also the sum of 6*l.* 6*s.*, being the balance due to the plaintiff from the defendant for rent of certain furnished apartments, as follows : —

	£	s.	d.
“ For rent, from the 4th of <i>March</i> 1839 to			
<i>September</i> the 4th, 1839 - - -	52	10	0
“ Cr. By payments on account - - -	46	4	0
	<hr/>		
	£6	6	0
	<hr/>		

“ And also the further sum of 26*l.* 5*s.* for a quarter's rent of the same furnished apartments, from the said 4th of *September* to the 4th of *December* 1839.”

At the trial before *Maule J.*, at the *Middlesex* sittings, in last *Easter* term, the plaintiff, in support of the first count of the declaration, produced the following letter, addressed by the defendant to the plaintiff, dated the 25th of *February* 1839, and bearing a 30*s.* stamp.

“ I hereby agree, according to our conversation of last evening, to pay you for the occupation of your first floor furnished, from *Monday, March* 4th, 1839, to *September* 4th, 1839, the sum of fifty guineas. I also agree either to occupy the rooms from *September* 4th to *December* 4th, furnished, on the same terms, that is to say, twenty-five guineas for the three months, or take them unfurnished at the rate of eighty guineas per annum.”

The plaintiff then gave in evidence a letter from himself to the defendant, without date, but written *August* 30th, 1839, as follows : — “ According to the terms of your agreement with me, you are at liberty, on the 4th *September* next, to continue the tenant of my apartments furnished, or to take them unfurnished, at the rate of

80 guineas per annum. I shall therefore be obliged if you will immediately announce to me your determination. But, in the event of your not doing so, before the 4th of *September* next, I shall consider you a tenant of the furnished apartments till the period named in the agreement, namely, till the 4th day of *December* next."

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It was stated by the plaintiff's counsel, but not proved, that the defendant occupied till the 11th of *August*.

It was objected on the part of the defendant, that the special count was not established by these letters. The learned judge, however, refused to nonsuit the plaintiff, and also refused to reserve leave to move to enter a nonsuit, unless the defendant would rest upon the case as it stood. This not being acceded to, the defendant proposed to give in evidence the following letter from the plaintiff addressed to the defendant, dated 25th of *February* 1839, but unstamped, written at the same time with the defendant's letter to the plaintiff. "I hereby agree to let you my first floor, furnished, from *Monday March* 4th, 1839 to *September* 4th 1839, for the sum of fifty guineas. At the expiration of that time you will, according to agreement, either continue to hold them furnished for the succeeding three months, ending *December* 4th, at the rate of twenty-five guineas for the said three months, or will take them unfurnished, for the year, at the rate of eighty guineas." The defendant proved that the plaintiff had given him notice to produce the last-mentioned letter.

It was objected that this letter required a stamp; and the learned judge being of that opinion, refused to receive it in evidence; and a verdict was found for the plaintiff, damages 21*l*.

Bompas Serjt., in the same term, obtained a rule nisi for a new trial; first, on the ground of misdirection, in

1841. holding and stating to the jury that the defendant's
 ——— letter proved the contract as laid in the first count;
 ATHERSTONE secondly, on the ground that the second letter had been
 v. improperly rejected.
 BOSTOCK.

Channell Serjt. now shewed cause. No objection was taken to the admissibility of the letter of the 30th of *August*; and that letter proved the defendant's liability to pay 21*l.* for a quarter's rent of the apartments unfurnished, from *September* the 4th to *December* 4th. If the contract contained in the letter of the 30th of *August* was correctly stated in the declaration, the plaintiff's case was complete; and it is submitted that it was correctly stated. The defendant, when he could not support the objection to the sufficiency of the two letters to make out the plaintiff's case, was not at liberty to meet that case by giving in evidence a third letter, unstamped, to prove that the parties had entered into a different contract from that declared upon, and which the plaintiff had established by the two letters, of which one was produced stamped, and the other was read without any objection being taken.

Bramwell, on the same side. The ground taken at the trial in support of the first objection was, that the terms "or to take them unfurnished at the rate of 50 guineas per annum," which occur in both letters, import a *yearly* tenancy. But it is submitted, that no period being mentioned, the language of the letters would be equally applicable to a taking for a week, or for two years, or for 100 years, as to a yearly tenancy. [*Tindal* C. J. "Rate" will apply to any time. *Maule* J. The words "at the rate of 80 guineas per annum," seem rather more appropriate to a period *different* from a year.] There is no difference between "taking" at the rate of 80 guineas per annum, and occupying at the

rate of 80 guineas per annum. Upon the second point, it was properly objected on the part of the plaintiff, that the letter tendered in evidence by the defendant could not be received for want of a stamp. If this third letter is to be considered as amounting to a counterpart, it would require the stamp imposed upon counterparts or duplicates of leases. (a) It was not contended at the trial that there was no agreement between the parties; nor was the letter offered in evidence for the purpose of shewing that the terms proposed by the plaintiff differed from those proposed by the defendant. [*Maule J.* If an instrument, admissible for any purpose, be improperly rejected, it will be a ground for a new trial.] It is not contended that the document was not evidence, but it was not evidence for the purpose for which it was sought to be used. [*Maule J.* I understand it was not put upon that ground when the motion was made.] No evidence was given to shew that the plaintiff was not entitled to recover on the merits.

Bompas Serjt., in support of the rule. The plaintiff abstained from calling any witnesses to prove the occupation of the apartments by the defendant, having, no doubt, good reason to believe that such witnesses, if called, would have established one or the other of the special pleas put upon this record. The form of the declaration and of the agreement, which it sets out, are very material. The notice to produce served by the plaintiff was put in, for the purpose of shewing that he recognized the letter mentioned in that notice as forming part of the contract between the parties. The court has lately held, that you may look at an unstamped instrument for the purpose of ascertaining what is the

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(a) *Vide* 57 G. 3. c. 184., Sched. Part I. tit. *Leases*.

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 ———
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subject matter to which it purports to apply. (a) The letters produced by the plaintiff cannot be held to amount to a lease, because the proposal there contained is in the alternative. [*Maule J.* Such a clause is often found in regular leases.] The two letters of 25th of *February*, taken together form one lease or one agreement. A counterpart is a copy of the lease executed by the lessee. (b) The plaintiff is not entitled to recover as upon a lease without shewing an acceptance of the lease on the part of the defendant, or occupation by him of the demised premises. [*Tindal C. J.* The defendant says, "I agree according to our conversation of last evening."] Still some assent by the plaintiff to the terms of the defendant's letter should have been shewn. [*Maule J.* People need not go on assenting for ever.] A general taking is a yearly taking. [*Maule J.* Where do you find such a rule laid down?] Upon the true construction of the letter put in by the plaintiff, and most clearly upon the construction of both the letters of 25th *February* considered together, this was a yearly taking. [*Channell Serjt.* If the lease was in the alternative, it would require a larger stamp.]

Saunders, on the same side. The merits of the case have not been tried. If the defendant had an option to

(a) And see *Rex v. Pendleton*, 15 *East*, 449.; *Sutton v. Toomer*, 1 *Mann. & Ryl.* 125., 129.; *Thomas v. Cooke*, 3 *M. & R.* 444.; *Ib.* 446. (a).

(b) The counterparts or counterpanes of an indenture are the two pieces of one entire parchment (or paper) on which the contract between the parties is engrossed in duplicate, the piece sealed by one party being delivered to the other. The two parts put, or considered as put, together, constitute the

contract by deed. In common parlance, however, the counterpart or counterpane sealed by the party from whom the estate, &c. moves, is called the original; and the counterpart or counterpane sealed by the party accepting the estate, &c. is called the counterpart. When both counterparts or counterpanes are sealed and delivered by each party (which, of late years, has been frequently done), they are commonly spoken of as "duplicate originals."

hold the premises for a year, the contract set out in the declaration, which contains no such option, is not proved. The declaration limits the option to three months, whereas the contract proves it not so limited: *Wain v. Warlters* (a), *Boydell v. Drummond*. (b)

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TINDAL C. J. Upon the question first argued, I am of opinion that the letter offered in evidence on the part of the defendant was properly rejected for want of a stamp. The plaintiff, in support of his declaration, gave in evidence the letter written to him by the defendant on the 25th of *February*, — that letter constituting in itself a perfect agreement, being an assent on the part of the defendant to terms proposed by the plaintiff in a previous conversation between them. That letter was properly stamped, whether it be considered as a lease or an agreement. This evidence was said by the defendant not to be complete, because the agreement was made by several letters passing between the parties, and that two of those letters, namely, that put in by the plaintiff and another, offered in evidence by the defendant, formed the real agreement between the parties. If so, the new evidence produced by the defendant, constituting a new case, the letter should have been properly stamped. If two letters constitute an agreement, one of them ought to be stamped with a 1*l.* 15*s.* stamp, the provision of the stamp act (c) being, that “where divers letters shall be offered in evidence to prove any agreement between the parties who shall have written such letters, it shall be sufficient if any one of such letters be stamped with the duty of 1*l.* 15*s.*, although the same shall, in the whole, contain twice the number of a thousand and eighty words and upwards.” (d)

(a) 5 *East*, 10.(b) 11 *East*, 142.(c) 55 *G.* 3. c. 185: sched. Part I.(d) *Quære*, whether the intention of the legislature was not this, that agreements contained in several letters, not in the

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If the words of the first agreement had been, "or take them unfurnished *at the rent* of eighty guineas per annum," I should have had no doubt that the meaning was that the room should be taken for a year. (a) But the agreement, as it stands, does not carry to my mind the conviction that the parties must necessarily have contemplated a taking for a year. Where the terms of the agreement are doubtful, we have a right to look at the subsequent conduct of the parties. The plaintiff writes a letter to the defendant, in which he puts his construction upon the agreement, by telling the defendant that in the event of his not announcing to the plaintiff his determination to continue the tenant of the apartments furnished, or to take them unfurnished at the rate of eighty guineas per annum, he should consider the defendant as tenant of the furnished apartments till the period named in the agreement, viz. till the 4th day of *December* next. To this letter no answer is sent. The defendant, by his silence, assents to the construction put upon the agreement by the plaintiff. He appears to have considered that he was to hold for the three months; and I think the conclusion at which he seems to have arrived, was not an improper one.

BOSANQUET J. I am of opinion that this rule ought to be discharged. On the part of the defendant it has been argued, that this was not the case of a lease, but of an agreement to be gathered from several letters. Where an agreement is to be collected from several

whole exceeding 2160 words, might be given in evidence if a 30s. stamp were imposed upon any of them, and that 35s. should be sufficient, although the entire correspondence should exceed 2160 words. *Vide Parkins v. Moravia*, 1

Carr. & P. 376, 379.; *Stead v. Liddard*, 1 *Bingh.* 196., 8 *B. Moore*, 2.; *Hemming v. Perry*, 2 *M. & Scott*, 375.; *Peate v. Dicken*, 5 *Tyrrwh.* 116., 1 *C.M. & R.* 422., 3 *Dowl. P. C.* 171.

(a) The words "for the year" appear to be even stronger.

letters, a stamp of 1*l*. 15*s*. is necessary. (a) No such stamp having been affixed, the case must stand upon the defendant's letter to the plaintiff, the terms of which do not appear to me to vary from the contract set out in the declaration. The expression relied upon by the defendant is the term "rate," which is used, not in the defendant's letter, but in the plaintiff's. Standing by itself, I think the letter does support the declaration. I think that even if the second letter had been admitted it would not have varied the case, as the plaintiff does not in that letter say you have mistaken the effect of our conversation; but, on the contrary, he states his assent to the agreement. (b) The defendant, on receiving this letter, must have understood that the plaintiff thereby intended to assent to the terms of the defendant's letter. Agreeably to this view of the case, the letter of the 30th of *August* only contemplates a taking for three months. No answer having been returned to the letter of the 30th of *August*, the defendant must be considered as having assented to what is said in that letter, — that the plaintiff would consider the defendant as his tenant till the 4th of *December*, unless an answer was returned.

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MAULE J. I think also that the rule must be discharged. It appears to me that the construction of the first letter is very plain. The probability is, that nothing had passed on the day before beyond a proposal on the part of the plaintiff. It is clear that the agreement between the parties consisted of the parol proposal, or conversation, and the defendant's letter, acceding to what had been proposed by the plaintiff. Upon the sending of that letter, the contract was complete. The subsequent letter of the plaintiff would have the effect of altering the terms of the agreement which had already been con-

(a) *Sed vide supra*, 519. (d). (b) *Sed vide*, 520. 522. (a)

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 ———
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cluded. That letter being, therefore, evidence of a new and substituted agreement, would require a stamp; as was ruled by my brother *Bosanquet* at *Hereford*.

Rule discharged. (a)

(a) Upon a plea of *non est factum* to a declaration in covenant, if the indenture produced with a 1*l.* 15*s.* deed stamp contained less than 2160 words, it would be read in evidence for the plaintiff, although it referred to an unannexed schedule, the contents of which were unconnected with any of the breaches of covenant assigned. If the defendant produced the schedule—containing 10,000 words,—for the purpose of shewing that the indenture was insufficiently stamped, an objection that the schedule could not be read, *for that purpose*, without a stamp, would probably not prevail.

In the principal case it might perhaps have been said, “If the effect of the plaintiff’s letter of the 25th of *February* had been, to set up a new agreement in substitution for a former completely concluded agreement, that letter would have required a 1*l.* 10*s.* stamp. But it is admitted that the two letters were contemporaneous. It is true that an acceptance by the defendant, of a proposal made by the plaintiff and unrecalled by him, would constitute a binding agreement; but the defendant’s *statement* in his letter as to what the plaintiff had proposed, would not shew,—as against any contemporaneous statement of the plaintiff,—that such a proposal had been made; still less that it was a continuing proposal down

to the time of the alleged acceptance of that proposal.”

Where the language of a bought note differs from that of the sold note, the first question is, whether they can be reconciled so as for each to stand. If both a bought and a sold note required a stamp, it is conceived that in an action brought by the vendor upon the stamped sold note, it would be competent to the vendee to produce the unstamped bought note, for the purpose of shewing that inasmuch as the plaintiff had not *sold* upon the terms contained in the bought note, the defendant could not have bought, and therefore had not bought, on those terms.

In the principal case, it is probable that neither party was aware of the existence of any material discrepancy between the two interchanged letters. A contrary supposition would involve a charge of gross negligence, or of fraud. Nor indeed does any such discrepancy appear really to exist; the omission of the term “for the year” in the defendant’s letter, not being at variance with the insertion of it in the plaintiff’s; though in consequence of the former letter alone being considered as legitimately before the court, the *inference* drawn from the omission, led to a conclusion directly the reverse of that which would have resulted from the insertion, of those words.

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DOE on the demise of JAMES WINNALL v.
FRANCIS BROAD.

Feb. 4.

EJECTMENT, for lands in the chapelry of *Elm-bridge*, in the county of *Worcester*, on a single demise and ouster, laid on the 1st of *January* 1840.

The consent rule, instead of specifying the premises for which the tenant meant to defend, adopted, as is frequently done, the vague language of the declaration. The defendant, therefore, upon an affidavit setting out a demise, by indenture, to himself from the lessor of the plaintiff of certain hereditaments, and a demise of other hereditaments, under a written agreement, and stating that he was ignorant what premises (a) were sought to be recovered, and what breaches of covenant or agreement were intended to be alleged against him, obtained an order on the 25th of *February*, 1840, requiring the plaintiff to deliver "a particular of the premises for which he goes, and of the breaches for which the ejectment is brought with the first of the breaches the plaintiff can furnish, and, in default, proceedings to be stayed." Under this order the following particulars, (which relate only to the hereditaments demised by the indenture,) were delivered.

"The lessor of the plaintiff seeks to recover all that messuage, tenement, or dwelling house, with the garden,

(a) There had been previous litigation between these parties, in which the only question was, whether in *August* 1838, the defendant had surreptitiously obtained the signature of the lessor of the plain-

tiff to a receipt for 20*l.* as for a half year's rent due at *Lady-day* 1838 instead of *Lady-day* 1837, three half-years' rent being due at the time of the payment. This action ended in a compromise,

Where, in ejectment by landlord against tenant, particulars of breaches of covenant are delivered, — for selling hay and straw off the land, removing manure, and non-cultivation, — evidence of a breach of covenant by mismanagement in over-cropping, or by deviating from the usual rotation of crops, is inadmissible.

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buildings, hereditaments, and appurtenances to the same belonging: and also all those four pieces or parcels of arable, meadow, and pasture, containing in the whole, by admeasurement, twelve acres, or thereabouts (be the same more or less), all which said messuage or tenement, pieces or parcels of land, hereditaments, and premises are situate, lying, and being near *Crutnell Green*, in the chapelry of *Elmbridge*, in the county of *Worcester*, now in the occupation (a) of the above named defendant.

The breaches for which this action is brought are, for selling hay and straw off the premises, removing manure, and non-cultivation, on or about the 1st day of *November* 1839. Dated the 25th day of *February* 1840."

At the trial, before *Gurney B.*, at the *Worcester* Spring assizes, 1840, the indenture of lease, dated 23d of *October* 1824, was produced by an attorney who held the same for both parties. It contained a demise from the lessor of the plaintiff to the defendant of the hereditaments mentioned in the particulars, for twenty-one years from *Lady-day* 1830, subject to a proviso for re-entry upon breach of any covenant. It also contained a covenant *on the part of the defendant* "that he would not, during the term, plough or break up any part of the meadow or pasture land thereby demised, but would, in every respect, use, manage, and cultivate the demised premises according to the usual and most approved system of husbandry practised amongst farmers and agriculturists in that part of the county of *Worcester* where the lands lie; and, in such state of management and cultivation, would yield and give up the same at the expiration, or other sooner determination, of the demise:" and also a covenant *between the parties* "that if

(a) Possession being now this part of the description admitted by the consent rule, appears to be unnecessary.

more manure were made upon the premises than what was wanted to improve the cultivation of the same, it should be lawful for the defendant to sell and dispose of the same to any person or persons whatsoever."

The plaintiff proved that, by the custom of the country, hay could not be removed from the demised premises except where the landlord assented to its being removed, the tenant bringing on an equal quantity of manure. It was shewn that hay and straw had been sold from the premises by the defendant; but evidence was produced on the part of the defendant that he had brought manure to the premises, and that there was no deficiency of manure. Evidence was produced on the part of the plaintiff, that the farm had been mismanaged by overcropping and by deviating from the usual rotation of crops; but this evidence was rejected by the learned judge as inapplicable to the breaches mentioned in the particulars delivered. The evidence as to the bringing of manure upon the premises, was objected to on the part of the defendant, as irrelevant. It was, however, received, a note being taken of the objection.

The learned judge called the attention of the jury to the terms of the covenant; and told them that, in his opinion, there was fair general evidence of the custom of the country; that it had not been proved that the defendant had sold manure, and that supposing he had sold hay, the lessor of the plaintiff was not injured, inasmuch as the defendant had brought manure upon the land; and that it was for them to say whether the defendant had broken his covenant. The jury stated that, in their opinion, there had been no breach of the covenant.

The verdict having been entered for the defendant,

Talfourd Serjt., in *Easter* term moved for a rule nisi for a new trial, on the ground of the improper rejection

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of evidence, the improper admission of evidence, and for misdirection. Upon the first point, the learned judge refused to receive evidence, except as to removal of hay and straw, and excluded evidence of defective cultivation. It is submitted that evidence of defective cultivation was admissible under the term non-cultivation. The particulars, though inartificially framed, could not have misled the defendant, who knew that the farm had not lain waste. Upon the second point, it was proved on behalf of the plaintiff, that the defendant had, on one or two occasions, removed hay from the premises. The defendant called witnesses to shew that the land was sufficiently manured; but on the part of the plaintiff it was contended that this evidence was irrelevant to the question between the parties, which was, — whether the custom had been proved, and whether it had been broken. Upon the third point, it is submitted that the learned judge should have pointed out to the jury the bearing of the evidence upon the breaches of covenant enumerated in the particulars; he ought not to have thrown both law and fact upon the jury, by barely leaving the case to them, to say whether the defendant had or had not broken his covenant. [*Bosanquet J.* The question comes to the improper reception of evidence.]

The rule was granted both upon the improper admission, and upon the improper rejection, of evidence.

Ludlow Serjt., (with whom was *Whateley*) now shewed cause. The lease contained no covenant restricting the defendant from selling hay and straw off the premises. The breach relied upon, was a breach of the covenant to cultivate according to the custom of the country. The general rule may be, that all the hay and straw grown upon the land should be consumed on the premises; but the object of that rule is to secure a sufficiency of manure upon the premises. It was ex-

pressly stipulated that if more manure should be made than was wanted to improve the cultivation of the premises, it should be lawful for the defendant "to sell or dispose of the same to any person whatsoever." The rule does not apply to a farm supersaturated with manure, as this was shewn to be. The evidence as to the state of the farm was therefore properly admitted, and the case was correctly left to the jury.

The evidence of over-cropping was properly rejected, as no breach of the covenant to manage the premises according to the usual and most approved system of husbandry in that part of the country, was stated in the particulars; out of which, more especially in a harsh (a) action brought to enforce a forfeiture, the plaintiff will not be allowed to travel.

Channell Serjt., (with whom were *Talfourd* Serjt., and *Busby*), in support of the rule. The evidence rejected was clearly admissible, unless the plaintiff was precluded, by the form of the particulars, from giving it. The lessor of the plaintiff was prepared, and offered, to

(a) "I do not think provisoes for re-entry in leases are to be construed with the strictness of conditions at common law. These are matters of contract between the parties, and should be construed, in my opinion, as other contracts; the parties agree to a tenancy on certain terms, and there is no hardship in binding them to those terms." *Per Lord Tenterden* C. J. in *Doe dem. Davis v. Elsam, Moo. & Malk.* 189. But relief will be given in equity against a forfeiture by breach of covenant by a lessee, in cases where complete compensation can be made; see *Davis v. West*, 12 *Ves.* 475. As to relief against

negligence and voluntary acts, see *Sanders v. Pope*, 12 *Ves.* 282., cited and remarked upon, 2 *Johns. Cha. Rep. (American)*, 535.; *Rolfe v. Harris*, 2 *Price*, 206. n. And see the general rule laid down by Chancellor *Kent*, 3 *Johns. Cha. Rep.* 535. See also *Reynolds v. Pitt*, 2 *Price*, 212. n., and 19 *Ves.* 134.; *Hill v. Barclay*, 16 *Ves.* 402., and 18 *Ves.* 56. 63.; *White v. Warner*, 2 *Merivale*, 459.; *Skinner v. White*, 17 *Johns. Rep.* 357.; *Vaughan, ex parte*, 1 *Turner & Russ.* 435.; *Doe dem. Mayhew v. Asby*, 10 *A. & E.* 71., 2 *P. & D.* 302.; *Conte, Landlord and Tenant*, 655.

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shew that the land was not ploughed or dressed as it ought to have been. This is called in the particulars "non-cultivation," — a term which is sufficiently intelligible, for it could not be supposed by the defendant, that he was charged with having abandoned the land. The action is not *founded* upon that which is stated in the particulars. They are merely given in ease of the defendant; and if they present any ambiguity, the defendant ought to apply for better particulars.

TINDAL C. J. The particulars state two positive breaches, and one negative breach. Upon the positive breaches no question is raised; but it is objected that under the breach by non-cultivation, the learned judge should have admitted evidence of overcropping. It does not appear to me that over-cropping comes within the ordinary meaning of the term "non-cultivation."

BOSANQUET J. I am of the same opinion. Non-cultivation means leaving the land to go to waste. I am acquainted with a part of the country in which large farms are taken, parts of which are left to be overrun with rushes.

MAULE J. I am also of the same opinion. The defendant may have been misled by these particulars. If the construction, now contended for, be correct, it might have been shewn, under the term "non-cultivation," that old grass lands had been improperly ploughed up.

Rule discharged.

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THOMAS HENRY FILMER v. WILLIAM BURNBY.

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ASSUMPSIT. The declaration, after reciting that before the making of the defendant's promise, a certain action had been commenced and prosecuted, by and at the suit of the plaintiff, against the defendant, in the court of our Lady the Queen, before the Queen herself, for the recovery of a certain sum of money, to wit, 234*l.* 12*s.*, then, and at the time of the making of the promise, due and owing from the defendant to the plaintiff, and executed, an agreement contained in such draft cannot form the subject of an action of assumpsit.

Where, in contemplation of a deed to be executed between the parties, a draft is prepared, is finally approved of, and is afterwards engrossed

To a count in assumpsit on such an agreement, non assumpsit is a sufficient plea.

In assumpsit upon a parol agreement, the defendant cannot, under non assumpsit, shew that an agreement, which was once a perfect contract, has since merged in a contract by deed. Per *Maule J.*

To a count containing an allegation — that the plaintiff consented and agreed not to take any further proceedings in a certain other action between the plaintiff and the defendant, and that by an order made by Mr. Justice A., it was ordered that all proceedings in the said action should be stayed, and that the same then were and thence hitherto have been and still are stayed, — the defendant pleads, that the further proceedings in the said action have not been and are not stayed according to the plaintiff's agreement in that behalf, but on the contrary thereof, the said action is still depending and not discontinued or stayed; and that it is by the said order of Mr. Justice A. ordered that, upon payment of, &c., [the debt for which that action was brought,] together with interest thereon, on, &c., all further proceedings should be stayed; and that unless the said debt and interest were paid as aforesaid, the plaintiff was to be at liberty to sign judgment and issue execution for the amount, with costs of judgment, &c. Replication, that the plaintiff did consent and agree not to take any further proceedings in the said action, and did cease, and hath from thence hitherto ceased, to prosecute the same, and all further proceedings therein were and have been stayed, according to the plaintiff's agreement in that behalf, — concluding to the country. Held, that upon the issue raised by this replication, the plaintiff was bound to prove an absolute stay of proceedings; and that such absolute stay of proceedings was disproved by the judge's order, which, upon production by the plaintiff, appeared to be in the conditional form stated in the plea.

An allegation of an offer to pay a "just and reasonable sum" in satisfaction of a demand for an attorney's bill of costs, is not established by proof of an offer to pay the costs when the bill is taxed.

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plaintiff, that is to say, the sum of 100*l.*, parcel thereof, for goods sold and delivered by the plaintiff to the defendant; and the sum of 134*l.* 12*s.*, residue thereof, for goods sold and delivered by the plaintiff to one *Mary Anne Hammond*, the wife of *George Hammond*, on the collateral guarantee of the defendant; and which action, at the time of the making of the promise, was depending in that court. That before and at the time of the making of the promise the defendant was entitled, under and by virtue of an indenture of settlement made on his marriage with one *Frances Faulconer*, to the residue of certain moneys in the said indenture mentioned: and the defendant was then also, under and by virtue of the said settlement, interested in, and entitled to, other residue of certain other moneys, to be recovered upon two several policies of assurance then effected on the life of his said wife *Frances*. Of all which premises the defendant, at the time of the making of the promise, had notice. And thereupon, on the 23d day of *January* A.D. 1840, in consideration that the plaintiff, at the request of the defendant (a), would accept the security thereafter mentioned, and would consent and agree not to take any further proceedings in the said action, the defendant promised the plaintiff to secure the said sum of 100*l.*, and so much, if any, of the said sum of 134*l.* 12*s.* as should not have been recovered before the 16th day of *November* then next, in an action which the plaintiff conditionally covenanted, at the request of the defendant, to commence against the said *George Hammond*, and also all costs and expenses which might be incurred in the last-mentioned action, with interest thereon, — by an assignment of the respective residues payable to the defendant under or by virtue of the said indenture of settlement as aforesaid; and also to give

(a) *Vide antè*, Vol. I. p. 265. (b), *post*, 574.

the acceptance of the defendant for the payment of the said debt of 234*l.* 12*s.* payable on the said 16th day of *November*, subject to the aforesaid agreement as to the said sum of 134*l.* 12*s.*, together with interest thereon; and also to pay the costs, as between attorney and client then incurred in the said action so commenced and prosecuted by the plaintiff against the defendant as aforesaid; and also the costs of and relating to the said security, and other the costs of the plaintiff then incurred, or to be incurred, by him in relation to the premises. Averment: that the plaintiff, confiding in the said promise of the defendant, did then consent and agree to accept the said security, and not to take any further proceedings in the said last-mentioned action; and thereupon afterwards, to wit, on the 23d day of *January*, A. D. 1840, by a certain order of the Honourable Mr. Justice *Williams*, then made, by consent, in the last-mentioned action, it was ordered that all further proceedings in the last-mentioned action should be, and the same then were, and from thence hitherto have been, and still are, stayed. Further averment: that although the defendant, in part performance of his said promise, did afterwards, to wit, on the 22d day of *January*, A. D. 1840 aforesaid, seal and deliver to the plaintiff, and the plaintiff then accepted, as such security as aforesaid, a certain indenture of assignment of the said respective residues payable to the defendant as aforesaid; and although the defendant did also then accept, and deliver to the plaintiff, a bill of exchange, drawn by the plaintiff upon the defendant, for the said sum of 234*l.* 12*s.* payable on the said 16th day of *November*, with interest thereon; nevertheless, although the costs as between attorney and client, then incurred in the said action so stayed as aforesaid, together with the costs of, and relating to, the said security, amounted to a large sum of money, to wit, 55*l.* 1*s.* 8*d.*, and although the costs

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of the plaintiff, then and since incurred by him in relation to the premises, amount to another large sum of money, to wit, 20*l.*; whereof the defendant afterwards, to wit, &c. had notice; yet the defendant not regarding, &c. hath not, although often requested so to do, paid the said costs as between attorney and client, then incurred in the last-mentioned action, or the costs of and relating to the said security, or the said other costs of the plaintiff incurred by him in relation to the premises, or any of them, or any part thereof; but, on the contrary thereof, hath wholly omitted and refused, and still doth omit and refuse so to do; by reason whereof the plaintiff heretofore to wit, on the 7th day of *March*, A.D. 1840 aforesaid, was forced and obliged to pay, and did necessarily and unavoidably pay, to *John Beardmore Wathen*, then being the attorney of him the plaintiff in and about the premises, a large sum of money, to wit, 55*l.* 1*s.* 8*d.*, being the amount of the said costs between attorney and client, incurred in the said action so stayed as aforesaid, together with the costs of and relating to the said security; and the plaintiff hath also become liable to pay to the said *J. B. Wathen*, as such attorney as aforesaid, another large sum of money, to wit, 20*l.*, as and for the costs of the plaintiff then and since incurred by him in relation to the premises. By means whereof the plaintiff hath, for a long space of time, to wit, from thence hitherto, lost, and been deprived of, the use, benefit, and advantage of the said sum of 55*l.* 1*s.* 8*d.*, and of divers great gains and profits which he might, and otherwise would, have obtained from the use of the same; and is, by means of the premises, otherwise greatly injured and damnified. To the damage of the plaintiff of 300*l.*

Pleas : first, non assumpsit; secondly, that the further proceedings in the said action so commenced and prosecuted by the plaintiff against the defendant, as in the

declaration mentioned, have not been, nor are they, stayed, according to the plaintiff's agreement in that behalf, and on the contrary thereof the said action is still depending and not discontinued or stayed; and it is by the said order of the said Mr. Justice *Williams* in the declaration mentioned, and which order bears date the 23d day of *January* 1840, ordered, that upon payment of 234*l.* 12*s.*, the debt for which that action was brought, together with interest thereon, on the 16th day of *November* then next, all further proceedings should be stayed; and it is thereby further ordered, that unless the said debt and interest be paid as aforesaid, the plaintiff is to be at liberty to sign final judgment and issue execution for the amount, with costs of judgment, execution, officers' fees, sheriff's poundage, and all incidental expenses. Verification.

Thirdly; that so far as relates to the nonpayment of the said costs, as between attorney and client, incurred in the said action commenced and prosecuted by the plaintiff against the defendant, as in the declaration mentioned, and the costs of and relating to the said security, — *actio non*; because the defendant says he was always, from the time of his making the said promise, and still is, ready and willing to pay a just and reasonable sum in satisfaction and discharge of those costs respectively; whereof the said *J. B. Wathen*, — being the attorney of the plaintiff, by whom such costs were claimed, — then had notice, and afterwards and before the commencement of this suit, to wit, on the 1st day of *March*, A.D. 1840, the defendant proposed and offered to the said *J. B. Wathen*, to pay him such just and reasonable sum in satisfaction and discharge of such costs respectively; but the said *J. B. Wathen* then refused to accept the sum so offered, and demanded of the defendant, for the said costs an exorbitant sum, and more than was justly due and of right payable to

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1841. him in respect of the said costs. Verification; and
 ——— prayer of judgment—if the plaintiff ought to maintain
 FILMER his aforesaid action against him as to the premises in
 v. the introductory part of that plea mentioned.
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April 11. The replication joined issue on the first plea.
 1840. Replication to the second plea, *precludi non*; because

the plaintiff says that he, at the time of the making of the said promise of the defendant, did, as in the said declaration alleged, consent and agree not to take any further proceedings in the said action, and did then, until and at the time the plaintiff so accepted the said security as aforesaid, cease, and hath from thence hitherto ceased, to prosecute the same; and all further proceedings therein, were at the time the plaintiff so accepted the said security as aforesaid, and from thence hitherto have been stayed, according to the plaintiff's said agreement in that behalf, — concluding to the country.

Replication to the last plea, — so far as that plea relates to the nonpayment of the costs as between attorney and client, incurred in the action commenced and prosecuted by the plaintiff against the defendant, as in the declaration mentioned, and the costs of and relating to the said security, *precludi non*, — because he saith that the defendant did not offer to pay the said *J. B. Wathen* a just and reasonable sum in satisfaction and discharge of such costs respectively, *modo et formâ*, — concluding to country, — and adding the *similiter*.

This cause was tried before *Maule J.* at *Westminster*, at the first sittings in *Easter* term, 1840, when a verdict was found for the defendant on all the issues, with liberty to move to enter a verdict for the plaintiff, — for such amount as *Mr. Robert Southee* should certify to be due.

The only witness examined, was *Mr. J. B. Wathen*, the plaintiff's attorney; who stated that in *December* 1839

he issued a writ of summons against the defendant *Burnby*, at the suit of the plaintiff *Filmer*, to which writ the said *Robert Southee* gave an undertaking to appear. The indenture mentioned in the declaration was produced and taken as proved, *Wathen* also producing the original draft. *Wathen* stated further that, prior to the execution of the deed, he had an interview with the said *Robert Southee*, who said that it was likely that the defendant would be unable to pay the costs upon demand; and that, in consequence of this representation, the recital in the deed was altered; that at the time of the execution of the deed, the amount of costs (which was afterwards found to be 55*l.* 1*s.* 8*d.*), had not been ascertained; that after the witness's bill of costs was delivered, the plaintiff had paid him the amount in goods; that a summons taken out to tax the bill was attended before *Tindal C. J.*, who refused to make any order.

The indenture mentioned in the declaration being read, appeared to be made between *Burnby* of the one part and *Filmer* of the other part; after reciting *Burnby's* title to the property, and also that *Burnby* then stood justly and truly indebted to *Filmer* in the sum of 234*l.* 12*s.*, viz. in the sum of 100*l.* for goods sold and delivered by *Filmer* to *Burnby*, and in the further sum of 134*l.* 12*s.* for goods sold and delivered by *Filmer* to one *Mary Ann Hammond*, the wife of *George Hammond*, of &c., on the collateral guarantee of *Burnby*; and that *Filmer* did, on or about the 3d day of *December* then last, commence an action in the court of *Queen's Bench* at *Westminster* against *Burnby*, for the recovery of the said sum of 234*l.* 12*s.*, and that such action was still pending; and that in order to prevent further proceedings in the said action, and the increase of costs consequent thereon, *Burnby* had proposed to secure the said sum of 100*l.* so due in respect of goods sold and delivered to *Burnby* as aforesaid, and also so

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much (if any) of the said sum of 134*l.* 12*s.* so due in respect of goods sold and delivered to the said *Mary Ann Hammond* as should not have been recovered on or before the 16th day of *November* then next, in an action which *Filmer* had conditionally consented, at the request of *Burnby*, to commence against the said *George Hammond* for the recovery of such last-mentioned sum; and also all costs and expenses which might be incurred, or sustained and paid by *Filmer* in such last-mentioned action, together with interest on such sum, costs, and expenses respectively, at the rate of 5*l.* per cent. per annum, by an assignment of the said respective residues, payable to *Burnby* under or by virtue of the said indenture of settlement as aforesaid of the thereinbefore mentioned sum of 8709*l.* 15*s.* 10*d.* 3½ per cent. new consolidated Bank annuities, and of the moneys to be recovered under the thereinbefore mentioned policies of assurance on the life of *Burnby*, remaining after deducting or satisfying the said sum of 8000*l.* mentioned in the same indenture of settlement, and also to give the acceptance of him, *Burnby*, for the whole amount of the said debt or sum of 234*l.* 12*s.*, payable on the said 16th day of *November* then next, subject to the aforesaid agreement as to the said sum of 134*l.* 12*s.*, together with interest thereon in the mean time at the rate aforesaid; and also to pay the costs, as between attorney and client, then already incurred in the said action; and also the costs of and relating to that security, and other the costs of *Filmer* incurred or to be incurred by him in relation to the premises; and to which *Filmer* had consented and agreed, and had accordingly agreed not to take any further proceedings in the said action. And also reciting that in part performance of the said proposal and agreement, *Burnby* had accepted and delivered to *Filmer* a bill of exchange drawn by *Filmer* upon *Burnby* for the said sum of 234*l.* 12*s.*, bearing even date with the said in-

indenture, and payable on the said 16th day of *November*, with interest from the date thereof; it is witnessed, that in further pursuance of the said proposal and agreement, and in consideration of the premises, and also in consideration of 5s., *Burnby* bargained, sold, assigned, transferred, and set over unto *Filmer*, his executors, &c., all that the residue payable to *Burnby*, under and by virtue of the said indenture of settlement, thenceforth absolutely, subject nevertheless to the trusts thereafter declared: Provided always and it was thereby agreed and declared that if *Burnby*, his heirs, executors, or administrators should either take up and pay the said bill of exchange when the same should become due and payable, or pay unto *Filmer*, his executors, &c. on the said 16th day of *November*, or within three months after the day of the decease of *Frances Burnby*, which should first happen, the sum of 100*l.*, and also so much, if any, of the sum of 134*l.* 12s., for which *Filmer* was about forthwith to commence an action against *George Hammond* as aforesaid, as should not have been recovered and received by *Filmer* from *George Hammond*, on or before the said 16th day of *November*, then next, or within three months after the day of the death of the said *Frances Burnby*, which should first happen, together with interest on such sums respectively at the rate of 5*l.* for 100*l.* by the year, to be computed from the day of the date of the indenture; and also should pay unto *Filmer*, his executors or administrators, on demand, all such costs, charges, and expenses as might be incurred, or sustained and paid by him or them in the last mentioned action, together with interest on such costs, as between attorney and client, charges, and expenses at the rate aforesaid, from the time, or respective times, when the same should be so incurred, or sustained and paid, without any deduction or abatement whatsoever, — then that indenture, and every thing therein contained, should cease and be void. And by

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that indenture *Burnby* did for himself, his heirs, executors, and administrators, covenant with *Filmer*, his executors, administrators, and assigns, that he, *Burnby*, his heirs, executors, or administrators would either take up and pay the said bill of exchange when the same should become due and payable, or pay unto *Filmer*, his executors, administrators, or assigns, on the said 16th day of *November*, or within three months after the day of the death of the said *Frances Burnby* (which should first happen) the said sum of 100*l.*, and also so much (if any) of the said sum of 134*l.* 12*s.* as should not have been recovered and received by *Filmer* from the said *George Hammond* on or before the said 16th day of *November*, or within three months after the death of the said *Frances Burnby* (which should first happen), together with such interest thereon as aforesaid: and also would pay unto *Filmer*, his executors or administrators, on demand, all such costs, charges, and expenses as aforesaid, together with such interest as aforesaid, without any deduction or abatement whatsoever; according to the effect of the said proviso, and the true intent and meaning of that indenture: provided always that *Filmer*, his executors, administrators, or assigns, should stand and be possessed of, and interested in, as well all moneys which might come to his or their hands, or be received by him or them, under or by virtue of that indenture, as also all moneys (if any) which might be recovered and received by *Filmer*, his executors or administrators, in the action to be brought against the said *George Hammond* as aforesaid (after paying and satisfying thereout all the extra or other costs of *Filmer*, his executors or administrators, in or about such action); upon the trusts following (that is to say), upon trust, in the first place to take up and pay the said bill of exchange when the same should become due and payable, and to retain and

pay thereout to and for himself and themselves respectively all other (if any) the principal and interest moneys thereby intended to be secured, which should be then due and owing to *Filmer*, his executors, administrators, and assigns, and all costs, charges, and expenses attending the recovery and obtaining payment of such moneys, and the execution of the trusts and powers thereby created, and to pay and assign the residue or surplus (if any) of the said moneys, after such payment and deductions as aforesaid, unto *Burnby*, his executors, administrators, and assigns.

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The following documents were then put in and read.

The writ of summons in the original action in the Queen's Bench, tested 6th of *December* 1839, and Mr. *Southee's* undertaking to appear thereto. The original bill of costs. A summons, dated 22d of *January* 1840 (the day the deed was executed), "to shew cause why on payment of the debt of 234*l.* 12*s.*, for which the action was brought, with costs to be taxed, all further proceedings should not be stayed." And the following order thereon, dated 23d of *January* 1840 (drawn up on the 19th of *February* 1840).

"*Filmer v. Burnby*. — Upon hearing the attorneys or agents on both sides, and by consent, I do order, that upon payment of 234*l.* 12*s.*, the debt due from the defendant to the plaintiff, for which this action is brought, together with interest thereon, on the 16th of *November* next, all further proceedings in this cause be stayed. And I further order, that unless the said debt and interest be paid as aforesaid, the plaintiff be at liberty to sign final judgment, and issue execution for the amount, with costs of judgment, execution, officer's fees, sheriff's poundage, and all incidental expenses. Dated, this 23d day of *January*, 1840.

"*J. Williams.*"

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Lastly, a further summons, and the following order thereon, dated 14th of *February* 1840.

“ *Filmer v. Burnby.* — Upon hearing the attorneys or agents on both sides, and by consent, I do order that Mr. *Robert Southee* forthwith enter an appearance for the defendant in this cause, pursuant to his undertaking. Dated, the 14th day of *February*, 1840.

“ *J. Williams.*”

On coming from the judge's chambers, the defendant's attorney offered to pay the amount of the bill of costs, on the basis of the agreement, when taxed. The present action was brought on the following day.

Erle, for the defendant, submitted, that on the first issue the plaintiff had failed; that the ultimate agreement was contained in the deed, in which there is a covenant applicable to the contract; and that what preceded was mere negotiation. On the part of the plaintiff it was contended, that the objection was not open to the defendant under the plea of non assumpsit.

The learned judge was of opinion that it was a question of fact whether there was a complete agreement, independently of the deed; and that if there was not, it was open to the defendant to insist upon the objection under non assumpsit.

A struggle also arose as to the verdict to be entered upon the second and third issues; but ultimately a verdict was taken for the defendant on all the issues, with leave to move to enter a verdict for the plaintiff, with such damages as the court should direct.

In the same term *Bompas* Serjt. moved to enter a verdict for the plaintiff on all the issues, with such damages as the court or an arbitrator should direct, or to

enter judgment for the plaintiff *non obstante veredicto*, on the second issue.

A rule nisi having been granted,

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Ludlow and *Channell* Serjts., and *Swann*, now shewed cause. It may be admitted, that if it had been shewn that the parties had come to a complete agreement by parol antecedently to the deed, though in respect of the cause of action contained in the deed, the defence of merger ought to have been pleaded, and could not have been set up under non assumpsit. But here there was no proof of any such antecedent contract. The deed, for the first time, carried into effect that which before was not binding upon the parties. The second issue is correctly entered for the defendant. The judge's order was a step in the cause; *Ball v. Stanley*. (a) Looking at the form of the third plea, there is no ground for disturbing the finding upon the third issue. The non-averment of the tender of a specified sum would, at most, be ground of special demurrer; *Painter v. Linsell*. (b) [*Tindal* C. J. You contend that taxation was the only mode of ascertaining the amount.]

Bompas, contra, in support of the rule. The plaintiff is entitled to have the verdict entered for him upon the first issue. A draft approved by the attorneys on both sides would have been sufficient to support a bill in equity for a specific performance, or an action of assumpsit for not executing. The deed recites the agreement as entered into at a by-gone period; therefore the words "hath agreed" are to be construed as meaning something more than "doth agree." The deed carries into effect the preceding agreement, but its operation is limited to the costs mentioned in the proviso which it contains.

(a) 8 Dowl. P. C. 344.

(b) *Ibid.* 250.

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The question is, whether, according to the new rules, it ought not to be pleaded that the contract was by deed. It is a defence "in confession and avoidance," as much as if the simple contract had merged in the subsequent deed. In the case of an illegal agreement there exists in point of law no contract, yet the defence must be pleaded; *Weston v. Foster*. (a)

The verdict upon the second issue ought to be entered for the plaintiff. If the plaintiff proves enough to entitle himself to maintain his action, it is immaterial that other allegations are found for the defendant. The plaintiff had a right of action at the moment he accepted the security. The defendant would have had his remedy by action if the plaintiff had refused to obey the judge's order. The allegation, — that it was ordered that all further proceedings should be stayed, — might have been struck out of the declaration, the order being prospective only. The defendant, instead of taking issue upon the agreement, has set up a defence under the order. It cannot be contended, that the performance of that order was a condition precedent, inasmuch as it was to take effect *in futuro*. [*Tindal C. J.* It frequently happens that a party loses an advantage by pleading too largely. *Maule J.* The *issue* is taken upon the staying of the proceedings; the replication alleges matter not denied in the plea; the matter so alleged is not in issue.] The only material allegation is, as to the staying the proceedings up to the time of action brought; the words "thence hitherto" may be rejected as immaterial. [*Maule J.* Is not the allegation as to the proceedings being stayed *up to the time of the acceptance of the security*, equally immaterial? If the stay of proceedings for one period is not a condition precedent, is it so for the other?] Either the fact is

(a) 2 New Ca. 693.

material and the plea bad, or it is immaterial and the finding upon the issue taken on the replication is also immaterial. [*Bosanquet J.* It cannot be meant by the third plea, that there was an offer to pay *instante*. *Ludlow Serjt.* referred to *Vincent v. Venner*. (a) *Tindal C. J.*, to *Bompas Serjt.*, You need not trouble yourself as to the third issue.]

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Hurlstone on the same side. Neither covenant nor debt could have been maintained in respect of the cause of action mentioned in this declaration. The deed refers to the costs in an action, — the proviso, by which the plaintiff is to hold the surplus, refers only to the costs of the action; the parties never intended that these costs should be included. It may be admitted that a recital amounts to a covenant, where it appears upon the whole instrument that the subject of such recital forms part of the arrangement between the parties. If a party recites that he is possessed of a term of years, and then assigns such term, it amounts to a covenant that he is so possessed. The covenant in this case does not state that the defendant has “hereby” proposed to pay these costs; and it is simply evidence of a prior contract. [*Bosanquet J.* No one doubts, that if a parol contract existed, and that contract merged afterwards, it must be specially pleaded.] It originally formed no part of the contract that these costs should be secured by deed; there were, therefore, two distinct contracts.

Upon the second issue, the plaintiff is entitled to have the verdict entered in his favour, or to have judgment *non obstante veredicto*. The contract consists of two parts; the defendant, by pleading to an immaterial allegation, cannot make that allegation material; the issue is joined upon the traverse in the replication only.

(a) 1 *Mylne & Craig*, 212.

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Provided the proceedings were stayed, it was not necessary that there should be any discontinuance of the action.

In support of the motion for judgment *non obstante veredicto*, the case of *Mapes v. Sidney* (a) may be referred to. In that case the mere fact of forbearance was held sufficient to maintain the action. *Cooks v. Douze* (b), *Jervis v. Sydney*. (c) The judge's order, which was conditional, could not have the effect of altering the plaintiff's right. The order was not adverse, but was made by consent.

TINDAL C. J. I am of opinion that the verdict entered for the plaintiff upon the first issue ought not to be disturbed. For the defence it was contended, that the contract, in respect of which the present action is brought, formed the subject of a covenant under seal, upon which the plaintiff has a remedy co-extensive with his demand in the present action. That defence involves two questions; first, whether the covenant in the deed was co-extensive with the contract declared upon; and, secondly, if so, whether there existed a complete parol contract antecedently to the deed; in which case the merger of that contract in the subsequent engagement under seal would be properly the subject of a special plea, and could not, since the rules of *H. 4 W. 4.* (d), be given in evidence under non assumpsit.

It appears to me that the covenant, read in connection with the recital and the proviso, is sufficiently large to embrace the two classes of costs which form the subject-matter of the present action.

Then the second question arising upon the first issue is, whether the defence is open to the defendant under the plea of non assumpsit. I cannot see, looking

(a) *Cro. Jac.* 683.(b) *Cro. Car.* 241.(c) 3 *Dowl. & Ry.* 483.(d) *Post*, 545. (a).

at the recital in the deed and at the evidence in the cause, that there was any distinct parol agreement, such as that declared upon. It appears to me that all that passed before the execution of the deed was mere negotiation, preparatory to a contract under seal. But it is said, that even if no substantive agreement, distinct from the deed itself, can be shewn, yet by the third rule of *H. 4 W. 4. Assumpsit (a)*, the defence, that the contract was by deed and not by parol, should have been specially pleaded. That rule, however, applies to those cases only where the defence is one which admits the promise stated in the declaration, but seeks to avoid the effect of such promise; whereas, here, the defence is, that there never was any parol promise, of which nature is the promise declared upon; and the effect of the plea of non assumpsit is to deny the making of *such* a promise.

Upon the second issue I think the verdict ought also to stand. The substance of that issue is, whether the proceedings in the action in the court of Queen's Bench had been stayed; and the affirmative of that issue was not proved.

Upon the third issue I think the verdict ought to be entered for the plaintiff. The allegation in the third plea, that the plaintiff proposed and offered to the said *J. B. Wathen* to pay him a just and reasonable sum in satis-

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(a) "In every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded. *Ex. gr.* infancy, coverture, release, payment, performance, illegality of considera-

tion, — either by statute or common law, — drawing, indorsing, accepting, &c. bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences, must be pleaded." *Vide Alcock v. Taylor*, 6 Nev. & Mann. 298.; *antè*, Vol. I. p. 232.

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\faction and discharge of such costs respectively, which is traversed by the replication, was not supported by evidence of an offer to pay "when the bill should be taxed."

BOSANQUET J. The material question in this case is, whether there was an agreement by simple contract between these parties, or whether the demand sought to be enforced in this action arose out of a contract by specialty. At the trial the learned judge was of opinion, upon the evidence, that no promise by simple contract had been established, and he accordingly directed a verdict to be entered for the defendant upon the first issue. It has been contended that this direction was erroneous. First, it is said that there was a complete agreement by parol antecedently to the execution of the deed; and, no doubt, if such an agreement had once existed, the means by which it had been put an end to would, under the new rules, be properly the subject of a special plea. But though the draft of the deed was signed by both parties, it was evidently not intended to operate as a contract obligatory on the parties, but to serve merely as a memorandum preparatory to the more formal instrument by which they meant to be bound. Where a negotiation takes place with a view to an arrangement to be perfected by deed, a draft is commonly prepared, for the purpose of obtaining the approbation of both parties to the substance and to the form of the proposed instrument, without any intention that the draft shall operate as an agreement by simple contract. In this case it is clear that the draft was merely preparatory to the deed, and was not meant to operate as a binding engagement. It was also contended, that the recital in the deed was evidence of a prior contract by parol, which, unless carried into effect by the deed, might be made the subject of an action of assumpsit. This

would depend upon the question, whether the costs, for the recovery of which the action is brought, are secured by the deed. It appears to me that they are; and that all, that is contained in the recital is carried into effect by the subsequent provisions of the deed. I am therefore of opinion, that the deed raises a covenant for the performance of that for which this action on simple contract is brought. The object of the parties having been effected by deed, the deed alone constitutes the contract between the parties.

As the plaintiff's demand is barred by the finding upon the first issue, the entry of the verdict upon the second issue becomes of comparatively little importance. I think, however, that if the proceedings have not been stayed, the verdict upon the second issue is properly entered for the defendant. I also think that a judgment for the plaintiff *non obstante veredicto*, in respect of any defect in the second plea, would be wholly ineffectual (a), since he could recover nothing upon such a judgment, after a finding for the defendant upon a plea of non assumpsit to the whole declaration. It does not, however, appear to me that there is any ground for the objection taken to the sufficiency of that plea.

Upon the third issue, I am of opinion that the verdict should be entered for the plaintiff, for the reasons stated by my Lord Chief Justice.

MAULE J. I also think that the verdict should be entered in the manner which has been suggested — upon the first and second issues, for the defendant; upon the third, for the plaintiff. It appears to me, that though there was *some* evidence upon the subject of a parol agreement antecedent to the deed, yet that, in point of fact, no complete parol agreement existed between

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(a) *Vide Shrewsbury v. Blount, antè, 508.*

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—— the deed was executed. There may perhaps have
FILMER been an agreement sufficient to entitle either party to
v. insist upon a specific performance, or to support an
BURNBY. action of assumpsit, upon a refusal to execute a deed in
conformity with the draft which had been signed. There
was, however, no agreement between the parties, other-
wise than as to what the deed should contain — no
agreement to *do* the things which it was contemplated
the parties should *covenant* to do. The actual agree-
ment would be no more than this, that the parties
should bind themselves by a deed to do certain acts;
and they have so bound themselves. No action of as-
sumpsit will therefore lie. If there had been a prior
parol agreement, the defendant could not, under a plea
of non assumpsit, have set up as a defence that the
engagement by simple contract had been extinguished
by a deed. But it is said, that though there was no
prior parol agreement, the defence, that the contract
was by deed, should have been pleaded specially. The
allegation, however, of a promise in a declaration in
assumpsit imports a *parol* promise, a promise *not* under
seal; and upon non assumpsit pleaded, the allegation
is not supported by shewing a promise under seal.

I think the second issue raised the question, whether
the proceedings in the action in the Queen's Bench
had been stayed. Those proceedings clearly were not
stayed; and the defendant is consequently entitled to
retain his verdict upon that issue also.

Upon the question, whether judgment could be
entered for the plaintiff *non obstante veredicto*, I give
no opinion; because I do not think that, in this state
of the record, that question can properly be raised.

Upon the third issue, though I entertain some doubt,
I incline to think that an offer to pay — what shall be
found due on taxation, — does not sustain an allegation

of an offer to pay — a just and reasonable sum. Consistently with the defendant's offer to pay what should be found due on taxation, *Wathen* may have been willing to accept "a just and reasonable sum," by voluntarily making any deduction from his bill which might be just and reasonable, and thereby render any taxation unnecessary. The defendant, by his offer, makes the taxation a condition precedent to his readiness and willingness to pay; whereas the plea states an unconditional readiness and willingness to pay a just and reasonable sum, whether the bill were taxed or not.

Rule discharged, as to the first and second issues; and absolute, as to the third issue.

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ASSUMPSIT. The first count of the declaration stated, that theretofore, to wit, on the 17th of *May* 1838, the plaintiff, at the request of the defendant, bargained and agreed with the defendant to buy, and bought of him, and the defendant then sold to the plaintiff, divers goods, to wit, thirty-nine pockets of *Sussex* hops, called or known by the name *Springett's*, containing divers, to wit, 65 cwt. 2 qrs. 2 lbs., and five pockets of other *Sussex* hops, at a certain rate or price, to wit, at the rate or price of 78s. for each cwt. of the said hops, to be paid for, by the plaintiff to the defendant, at the expiration of a certain credit, to wit, six

In an action for the non-delivery of hops, sold under the following contract: — "Of *E. Y.* thirty-nine pockets *Sussex* hops, *Springett's*, five pockets, *Kenward's*, 78s. *Springett's* to wait orders." Held, that the contract

imported a sale for ready money, and that parol evidence was not admissible to shew, that, by the usual course of dealing between the parties, the hops were sold on a credit of six months.

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months from the time of the making of the said bargain and agreement, the said thirty-nine pockets of *Sussex* hops called *Springett's* to be delivered by the defendant to the plaintiff, or his order, on request, but to wait orders, that is to say, to be kept by the defendant for the plaintiff until the plaintiff should give orders to the defendant for the delivery thereof. And thereupon afterwards, on the day and year aforesaid, in consideration of the premises, and that the plaintiff, at the request of the defendant, then promised the defendant to accept and receive, and pay for such hops upon the terms and at the time in that behalf agreed upon as aforesaid, the defendant undertook and promised the plaintiff to deliver such hops to the plaintiff, or his order, when the defendant should be thereunto afterwards requested; that afterwards, to wit, on the day and year aforesaid, the defendant delivered to the plaintiff, and the plaintiff then accepted and received of and from the defendant, part of the said hops so sold as aforesaid, to wit, the said five pockets of other *Sussex* hops; that the plaintiff, confiding in the said promise of the defendant, afterwards, and before the delivery of the said thirty-nine pockets of *Sussex* hops called *Springett's*, or any part thereof, to him the plaintiff, and before the expiration of the said credit, to wit, on the 2d of *October* 1838, bargained and agreed with one *Humble* to sell to him, and the said *Humble* then agreed to buy of the plaintiff, certain hops, to wit, twenty-six pockets of *Sussex* hops, called or known by the name of *Smith's*, of the growth of 1837, and thirty-nine pockets of *Sussex* hops called *Springett's*, of the growth of 1837, then represented by the plaintiff to be lying in *London*, &c., at a certain rate or price, to wit, the rate, &c. of 82s. per cwt., allowing, &c., and sixteen to eighteen pockets of *Kent* hops, of, &c., at a certain rate, &c., to be paid for by an acceptance of *Humble* at four months after date; that the said thirty-nine pockets

of *Sussex* hops called *Springett's*, so bought by the plaintiff of the defendant as aforesaid, were of the growth of the year 1837, and of the average quality of the samples by and according to which the said *Humble* agreed to purchase the thirty-nine pockets called *Springett's* of the plaintiff; that the plaintiff afterwards, to wit, on the day and year last aforesaid, and before the expiration of six months from the time of the making of the said first-mentioned contract, delivered to the said *Humble*, and the said *Humble* then accepted and received from the plaintiff the sixteen to eighteen pockets of *Kent* hops so agreed to be sold to the said *Humble* as aforesaid, and then ordered and requested the defendant to deliver the said thirty-nine pockets of *Sussex* hops called *Springett's*, so purchased by the plaintiff of the defendant as aforesaid, to the said *Humble*, on account of him the plaintiff. And although the plaintiff was always ready and willing to perform and fulfil the said bargain and contract so made by and between the plaintiff and the defendant as aforesaid, and to pay the defendant for the said hops so bought of the defendant as aforesaid, according to the terms of the said first-mentioned contract; whereof the defendant, on, &c., had notice; yet the defendant, not regarding the said promise, did not nor would, on the day and year last aforesaid, or at any other time, although he was then, to wit, on, &c., and oftentimes afterwards, requested so to do, deliver the thirty-nine pockets of *Sussex* hops called *Springett's*, so sold to the plaintiff as aforesaid, to the said *Humble*, or to the plaintiff or his order; but then wholly neglected and refused so to do, and then converted and disposed thereof to his own use; whereby the plaintiff was hindered and prevented from performing, and unable to perform and complete his said bargain and contract with the said *Humble*, so far as the same related to the sale of the said thirty-nine pockets

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of *Sussex* hops called *Springett's*, so agreed to be sold by the plaintiff to the said *Humble* as aforesaid; and in consequence thereof the said *Humble* then wholly refused to perform the said contract so entered into between him and the plaintiff as aforesaid, so far as the same related to the said thirty-nine pockets of hops called *Springett's*, and to the said twenty-six pockets of *Sussex* hops called *Smith's*, so agreed to be purchased by him of the plaintiff, and then refused to buy or to accept from the plaintiff the said twenty-six pockets of *Sussex* hops called *Smith's*, which the plaintiff was then ready and willing to sell and deliver to him; and by reason and in consequence thereof the plaintiff had been hindered and prevented from selling and disposing of the said twenty-six pockets of *Sussex* hops called *Smith's*, and of the thirty-nine pockets of *Sussex* hops called *Springett's*, or any part thereof, so advantageously and profitably as he otherwise might and would have done, and had also been deprived of divers gains and profits which he might and otherwise would have gained and acquired from performing and carrying into effect the said contract so entered into as aforesaid with the said *Humble*; and the said twenty-six pockets of hops called *Smith's*, and the said thirty-nine pockets of hops called *Springett's*, had become and were greatly deteriorated in value; and also by reason of the premises, the plaintiff had been forced and obliged to incur and pay, and become liable to pay, divers sums of money, amounting to 20*l.*, for warehousing, keeping, and taking care of the said twenty-six pockets of hops called *Smith's*. The declaration also contained a count for money had and received, and upon an account stated.

Pleas: first, non assumpsit; secondly, to the first count, that the plaintiff, at the said time when he requested the defendant to deliver to the said *Humble* the said thirty-nine pockets of *Sussex* hops called *Springett's*,

as in the declaration mentioned, refused to pay him the defendant for the said thirty-nine pockets of *Sussex* hops called *Springett's*, although then requested by the defendant so to do; *without this*, that the plaintiff was ready and willing to pay the defendant for the said hops so bought of the defendant as aforesaid, in manner and form as in the declaration alleged; concluding to the country. The third plea set up a lien for warehouse rent.

The plaintiff joined issue on the first and second pleas, and replied *de injuriâ*, to the third.

At the trial before *Tindal* C. J., at the sittings in *London* after last *Hilary* term, it appeared that in *May* 1838 *Walton* the defendant's traveller called upon the plaintiff at *Huddersfield*, and entered into a contract with him for the sale of hops, and that *Walton* made and signed the following note of the contract in the plaintiff's order book:—

“ Of *Edward Yates*,

39 pockets of *Sussex* hops, *Springett's*, }
5 pockets of *Sussex* hops, *Kenward's*, } 78s.

Springett's to wait orders.

May 14th, 1838.

Wm. Walton.”

The five pockets of hops (*Kenward's*) were delivered soon after the making of the contract. On the 3d of *October* 1838 the plaintiff agreed to sell to one *Humble*, among others, thirty-nine pockets of *Sussex* hops (*Springett's*) at 82s. per cwt., and gave him an order upon the defendant for the delivery of the thirty-nine pockets which the plaintiff had purchased of the latter. The plaintiff also wrote to the defendant on the 4th of *October*, desiring him to deliver the hops to *Humble*. To this letter the defendant on the 6th of *October* sent a reply, in which, among other things, he said, “ If you will remit the amount, they shall be immediately delivered.” On the 8th of *October* the plaintiff

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again wrote to the defendant, alleging that the hops had been sold to him on a credit of six months, and once more desiring that they might be delivered to *Humble*. The defendant's answer, on the 9th, contained no denial of the hops having been sold on credit.

Evidence was also tendered to shew that the usual course of dealing had been for the defendant's traveller to call upon the plaintiff twice a year, and that on each occasion the latter paid him for the goods which had been ordered on the previous journey. On the part of the defendant, this evidence was objected to upon the ground that it went to vary the written contract between the parties. The Lord Chief Justice thought it admissible, as the contract was silent as to the time for payment of the hops in question. The jury having returned their verdict for the plaintiff, damages 19*l.* 10*s.*,

Bompas Serjt. in last *Easter* term obtained a rule *nisi* for a new trial, contending that the evidence as to the general course of dealing between the plaintiff and the defendant was improperly received. He also moved in arrest of judgment, upon the ground that the declaration contained no averment that *Humble* was ready and willing to receive the hops, and cited *Morton v. Lamb*. (a) A rule *nisi* having been granted upon both points,

Talfourd Serjt. and *Peacock* now shewed cause. With respect to the first point — whether the evidence given was admissible to explain the contract — there is no doubt as to the law, but the difficulty is with respect to its application. Although it is not competent for a party to engraft upon a written contract any parol stipulation in contradiction of such contract, parol evi-

(a) 7 *T. R.* 125.

dence may be given of a collateral agreement, not inconsistent with the written contract; or where the latter is ambiguous, the parties may shew what was really meant by the terms which they have employed. *Greaves v. Ashlin* (a) is distinguishable from the present case. There, it was sought to introduce a distinct and independent stipulation, materially varying the relation of the parties. Here, it is uncertain, on the face of the contract, whether the goods were sold for ready money or at six months' credit; and the plaintiff merely sought to shew that, according to the usual course of dealing, the goods were sold at six months' credit. In *Powell v. Edmunds* (b), the parol evidence was rejected on the ground that it went to vary the written contract. So in *Yates v. Pim* (c), the evidence tendered would have introduced a material alteration into the contract. The question is, whether the present case is within the principle of the above authorities, or whether it falls within that class where, what has been considered to be a kind of omission in the contract, has been allowed to be supplied. In *Birch v. Depeyster* (d), a written agreement had been entered into, whereby it was stipulated that the defendant should receive 120℥. "in lieu of privilege and primage;" and a witness was called on his part to state what one of the plaintiffs had said respecting privilege before the agreement was made. Gibbs C. J. held the evidence admissible, observing, "The case turns upon the meaning of the word *privilege*. This is a mercantile term; and I must leave its meaning for mercantile men. Then, if indifferent witnesses may be called to explain what is understood by *privilege*, may we not hear the construction put upon the word by the parties themselves, before the agree-

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(a) 3 *Campb.* 426.(b) 12 *East*, 6.(c) 6 *Taunt.* 446.(d) 4 *Campb.* 385.; 1 *Stark. N. P. C.* 210.

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ment was entered into?" In *Smith v. Wilson* (a), which was an action of covenant upon a lease of a rabbit warren, it was held that evidence was admissible to shew that by the custom of the country where the lease was made, the word thousand, as applied to rabbits, denoted twelve hundred. So in *Hutton v. Warren* (b), where a question arose, whether evidence of the custom of the country was admissible, the tenant holding under the terms of a lease; *Parke* B. said, "It has long been settled, that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been upon the principle of presumption, that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages." So here, it is to be assumed that the parties in entering into this contract intended the goods to be supplied on a six months' credit, by reference to the usual course of dealing between them.

Another question is, whether this was intended to be a final agreement, or it is a mere memorandum of an order; for if it be only the latter, then parol evidence is admissible. It is clear, that if there had not been a part delivery of the goods, it would not have been a note or memorandum of a contract sufficient to satisfy the statute of frauds. The plaintiff's name is not mentioned; and taking the memorandum as it stands, 78s. would appear to be the price of the whole hops sold. If parol evidence is not receivable to shew that they were sold on credit, the defendant could not be

(a) 3 B. & Ad. 728.

(b) *Tyrwh. & G.*; 1 M. & W. 466.

allowed to prove that those figures meant 78s. per cwt. There are several cases in which parties have been permitted to prove, by parol, terms as to which the agreement was silent; *Ingram v. Lea* (a) and *Knapp v. Harden* (b), referred to in *Phill. on Ev.* 772, 773. (8th edit.). In *Jeffery v. Walton* (c), where at the time of hiring a horse a note of the agreement was made, stating the time and the price, it was held that the plaintiff was not precluded from proving by parol evidence additional terms of agreement. Lord *Ellenborough* C. J. said, "The written agreement merely regulates the time of hiring and the rate of payment; and I shall not allow any evidence to be given by the plaintiff in contradiction of these terms; but I am of opinion that it is competent to the plaintiff to give in evidence supplementary matter as part of the agreement." So here, the contract being silent as to the time of payment, the plaintiff was at liberty to supply the omission by parol evidence. It is apprehended, if the order for the hops had been verbal, that evidence of the former dealings between the parties would have been admissible; and it is the same thing where there is a written agreement, but that agreement is wholly silent as to the terms of credit.

With respect to the second point, the declaration contains a general averment by the plaintiff of his readiness to perform the contract, and an allegation that the defendant neither delivered the hops to *Humble* nor to the plaintiff. The request stated to deliver the hops shews that the plaintiff was willing to receive them. The declaration, therefore, is clearly sufficient, after verdict. (d)

Bompas Serjt., in support of the rule. It is submitted that the evidence of the previous dealings between the

(a) 2 *Campb.* 521.

(b) 1 *Gale*, 47.

(c) 1 *Stark. N. P.* 267.

(d) See *Kemble v. Mills*, 1 *Mann. & G.* 757.; 2 *Scott's New Rep.* 121.

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parties was improperly received, as it went to vary the contract. Where goods are sold at a stipulated price, in the absence of any express stipulation to the contrary, the delivery of the goods and the payment of the price are to be concurrent acts. The engrafting, therefore, upon this contract of a provision for a six months' credit, which would compel the vendor to part with his goods without receiving the price, would materially vary such contract. *Greaves v. Ashlin* is a direct authority. In that case, which was an action by the purchaser against the seller for not delivering oats contracted to be sold under the following note, "Sold to *John Greaves* fifty quarters of oats at 45s. 6d. per quarter out of 175 quarters;" Lord *Ellenborough* held, that it was not competent to the defendant to prove a verbal condition that the plaintiff was to take away the oats immediately, inasmuch as such evidence "materially varied the contract, which had been reduced into writing;" and he cited *Meres v. Ansell*. (a) His lordship also ruled that a witness could not be asked, whether, according to the usage of the corn market, if corn be sold to be delivered at a distant day, the time should not be inserted in the contract; as that was only "an indirect method of giving parol evidence to vary the contract." So in *Powell v. Edmunds* (b) where, on a sale of growing timber, the conditions of sale were silent as to the quantity, parol evidence that the auctioneer at the time of sale warranted a certain quantity was held inadmissible. Lord *Ellenborough* C. J. there said, "If the parol evidence were admissible in this case, I know of no instance where a party may not by parol testimony superadd any term to a written agreement, which would be setting aside all written contracts and rendering them of no effect." So in *Yates v. Pim* (c), where bacon sold to the plaintiff had

(a) 3 Wils. 275.

(c) 6 Taunt. 446.

(b) 12 East. 6.

been warranted in writing as prime singed bacon, it was held that evidence could not be given of a practice in the bacon trade to receive bacon, to a certain degree tainted, as prime singed bacon, or of a practice to preclude the purchaser from all remedy, if he did not discover and point out the defect by an early day. And in *Halliley v. Nicholson* (a) it was held that parol evidence is not admissible to explain an imperfectly worded written contract, although some parts of it are difficult to be understood alone.

With respect to the point that this is not a perfect contract, even admitting for the sake of the argument that you must add something to it to render it in some respects intelligible, it does not follow, that parol evidence is admissible with regard to those terms which are not doubtful. Supposing, therefore, that evidence is requisite to shew that the contract relates to the *sale* of hops, it is by no means a necessary consequence, that the opposite party may be allowed to prove that the goods were sold on credit; for there can be no doubt, if the agreement is one of sale, that it is for ready money. The admission of parol evidence to explain technical terms in use among mercantile men rests on a different principle. [He was here stopped by the court.]

TINDAL C. J. My two learned brothers think that the legal construction of this contract is, that the hops were to be paid for on delivery, and consequently that the evidence given on the part of the plaintiff that the goods were sold on credit ought not to have been received. The rule for a new trial must therefore be made absolute.

BOSANQUET. J. The doubt I have entertained in this case has been, whether the writing in question amounted

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(a) 1 Price, 404.

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to a final contract, or was merely a memorandum ; and if so, whether the plaintiff was not at liberty to shew what was the meaning of the parties with respect to the time of payment for the goods. But, on further consideration, it appears to me, that the writing does, in terms, import a contract of sale for ready money. *Greaves v. Ashlin* is a decisive authority that parol evidence is not admissible with respect to terms which appear on the face of the contract. In *Jeffery v. Walton* the memorandum was clearly imperfect, and some evidence was necessarily required to shew the other parts of the agreement. Here, it seems to me, that the terms of the contract sufficiently disclose that the sale of the hops was for ready money ; and, if so, parol evidence is not admissible to prove that the sale was on credit.

MAULE J. I also think that this was a contract for the sale of hops, and that the meaning of it was that the one party was to keep his hops, and the other his money, until an exchange should be effected ; and, therefore, that parol evidence could not be received to vary the written memorandum.

Rule absolute.

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SMITH v. KNOWELDEN.

Feb. 5.

CASE, for defamation. The declaration charged the defendant with having uttered the following words of the plaintiff. "*Smith* has got himself into trouble; he is out on bail for 100*l.*, and he is to be tried at the *Old Bailey* next *Monday*, for buying cocks which have been stolen from *Pontifex* and Co., by one of their apprentices, who sold them to a person named *Westbrook*, who again sold them to *Smith*."

At the trial before *Coltman* J., at the second sitting in *Hilary* term 1840, the slander was proved as laid in the declaration, except that, instead of the words, "and he is to be tried at the *Old Bailey*," the expressions were, "and *I have heard* that he is to be tried, &c."

Upon the part of the defendant, it was contended, that the plaintiff ought to be nonsuited on the ground of variance.

For the plaintiff it was submitted, that the variance was not material to the merits of the case, and that the record might be amended pursuant to the 3 & 4 *W.* 4. c. 42. s. 23., which empowers the judge to cause the record, writ, or document on which any trial may be pending, "when any variance shall appear between the proof and the recital, or setting forth on the record, writ, or document, on which the trial is proceeding, of any contract, custom, prescription, name, or other matter, in any particular or particulars in the judgment of such court or judge, not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, to be forthwith amended, &c."

c. 42. s. 23., or by a special indorsement on the nisi prius record under s. 24.

In an action of slander, the words laid in the declaration were "S. has got himself into trouble; he is out on bail for 100*l.*, and he is to be tried at the *Old Bailey*, for buying cocks which have been stolen from P. and Co. by their apprentice, who sold them to W., who sold them to S." The words proved were, "S. has got himself into trouble; he is out on bail for 100*l.*, and *I have heard* he is to be tried, &c."

Held: a variance; but one which might be cured by an amendment at nisi prius, under the 3 & 4 *W.*

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The learned judge refused to nonsuit the plaintiff, but took the opinion of the jury on the words proved, and directed their finding to be indorsed on the record under the provisions of the twenty-fourth section of the 3 & 4 W. 4. c. 42. (a) A verdict having been returned for the plaintiff, with 40s. damages,

Channell Serjt., in *Easter* term last, in pursuance of leave reserved at the trial, obtained a rule *nisi* to enter the verdict for the defendant, or for a nonsuit; against which

Bompas Serjt. and *Saunders* now shewed cause. It is not necessary to enter into the question, whether there is a material variance between the words charged in the declaration, and the proof; for assuming that there is a variance, it is clear that it is amendable under the statute. Whether the words actually spoken were those laid in the declaration, or those proved in evidence, they impute the same offence to the plaintiff, and there is no ground for saying that the defendant would be prejudiced in his defence by the amendment. The authorities on the subject have gone much beyond the present case.

Channell Serjt. and *Wordsworth*, in support of the rule. There can be no doubt that this is a variance. [*Tin-*

(a) Which enacts, "that the said court or judge shall and may, if they or he think fit, in all such cases of variance, instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts according to the evidence; and thereupon such finding shall be stated on such record or document; and notwithstanding the finding on

the issue joined, the said court, or the court from which the record has issued, shall, if they shall think the said variance immaterial to the merits of the case, and the misstatement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case."

dal C. J. We think it is.] It is moreover a variance material to the merits of the case; for the words "I have heard" give a different character to the charge, and shew that, instead of being an assertion within the knowledge of the party by whom it is made, it is merely idle gossip. In an action of this kind, the amount of compensation depends on the nature of the charge, and whether it is of an aggravated character or not. The defendant would clearly be "prejudiced by an amendment;" because, if the words had been laid as proved, he might have suffered judgment by default, or otherwise have pleaded a justification. In *M'Pherson v. Daniels* (a), *Parke* J. says, "It appears from *Bell v. Byrne* (b), that if a defendant has not made an assertion as his own, but has merely alleged that some other person had made it, it must be so averred; and that an averment in a declaration — that the defendant used slanderous words — must be taken to mean that he used them as his own words and as a substantive allegation of his own, and will not be supported by proof that he used them as the words of another person." No case has occurred in which an amendment has been allowed in an action for verbal slander. [*Bosanquet* J. It was clearly contemplated by the framers of the act.] There are many statutes which place actions for words on a different footing from actions for written slander; and the general policy of the law has been to discourage the former. If judges have the power of amendment under the 3 & 4 *W. 4. c. 42.* in actions for words, it should be very sparingly exercised.

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TINDAL C. J. I do not agree that the twenty-third section of the 3 & 4 *W. 4. c. 42.* is to be strictly con-

(a) 10 *B. & C.* 263.; 5 *Mann. & R.* 251. (b) 13 *East*, 554.

1841. strued; I should rather say, that it ought to receive a liberal interpretation. The object of the legislature in passing the statute being to prevent the necessity of multiplying counts, it would be unjust to tie a plaintiff down to the restrictions imposed by the new rules of pleading, if he were not at the trial to have the full benefit of the power of amendment intended to be conferred by this section. It may be difficult to give any precise meaning to the words "merits of the case," when applied to an action like the present, but they seem to intend the substantial matter which the parties came to try. The other words, "prejudiced in the conduct of his action," are capable of a clearer explanation. Here, I cannot see how the defendant could possibly be prejudiced in his defence by allowing this amendment to be made; for any witness called in support of the plea of not guilty might disprove the one form of expression as well as the other. If the defendant wished to plead a justification, or if he were taken by surprize, the judge was authorized to postpone the trial. It cannot be said that the defendant was prejudiced, in respect of the amount of the damages, by the words *laid* in the declaration; for it was the words *proved*, which were left to the jury. It seems to me that this case is clearly within the statute, and that the amendment should be allowed on payment of costs.

BOSANQUET J. I also am of opinion that this is a variance; but that it is one in which the court authorized to allow an amendment to be made. I can by no means agree with the proposition, that the power of amendment given by the 3 & 4 W. 4. c. 42. ought to be sparingly exercised. Many cases have occurred in which the judges have expressed a different opinion. In *Sainsbury v. Matthews* (a), Parke B. says, "Unless

(a) 4 M. & W. 848.; 7 Dowl. P. C. 28.

the judges are very liberal in the allowance of amendments, the rule which binds a plaintiff to one count will operate very harshly." By the statute no amendment is to be made except in some particular "not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence." Here, the introduction of the words "I have heard." leaves the slander as actionable as before, although the amount of damages may be lessened. It does not appear to me that a variance which is not material to the issue raised, but which may affect the quantum of damages, was within the contemplation of the legislature when speaking of the "merits of the case." I agree with the Lord Chief Justice, that as the damages were given for the words as proved, and as the defendant did not apply to amend his pleadings, or to put off the trial, it does not appear how he could have been prejudiced in his defence.

MAULE J. I also think that this is a case in which an amendment ought to be made. The power of a court or a judge to allow amendments was given in lieu of the power which a plaintiff formerly had of introducing a variety of counts in his declaration; and the judges ought, therefore, to be as liberal in making amendments as pleaders used to be in inserting a multiplicity of counts. With respect to the merits of this case, the question was, whether the defendant had used words imputing an offence to the plaintiff; if so, the precise words employed were not material. If we were to hold that every thing is "material to the merits," within the meaning of the statute, which may vary the amount of damages, we should exclude amendments in almost every case. The judge, under the discretion vested in him by the act, may take into consideration not only the facts and circumstances, but also the

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1841. conduct of the parties at the trial. Here, it cannot be
—— doubted that the defendant meant to deny that he had
SMITH used any words imputing the offence to the plaintiff
v. charged in the declaration. It is very likely that neither
KNOWELDEN. party expected the precise words laid in the declaration
to be proved, but that they came prepared to try
whether the plaintiff was injured by the slander, and
to what extent.

Rule discharged ; the plaintiff to be at liberty to
amend the record and pleadings in accord-
ance with the finding of the jury, on pay-
ment of costs. (a)

(a) See *Smith v. Brandram*, *antè*, p. 244.

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GROOM, surviving Assignee of COLNAGHI, v.
BLUCK.

ASSUMPSIT. The declaration, — after reciting an indenture of lease of the 28th of *November* 1826, whereby a house and premises in *Cockspur Street* were demised to *Colnaghi* for twenty-one years, and setting out proceedings in bankruptcy, under which *Colnaghi* was duly declared a bankrupt, and the plaintiff and one *Marks* (since deceased) were appointed his assignees, and became possessed of the said demised premises, — averred that afterwards, to wit, on the 30th of *August* 1833, a memorandum of agreement was made between *Marks* and the plaintiff, as such assignees, and the defendant, whereby *Marks* and the plaintiff agreed to sell, and the defendant agreed to buy, the shop fixtures in the said house in *Cockspur Street*, and all the stock in trade; in consideration whereof *Marks* and the plaintiff thereby agreed well and sufficiently to convey unto the defendant the said shop

Under an agreement to assign a lease, the defendant agreed to pay the rent and taxes to become due in respect of the premises after a certain day, and to indemnify the plaintiff against the rent and covenants contained in the lease, and from all loss which he might incur by the non-payment or non-observ-

ance of such rent or covenants.

No legal assignment was made, but the defendant was let into possession, and certain of the plaintiff's goods which had been left upon the premises were distrained for the rent and taxes. In an action upon the agreement for not indemnifying, the declaration alleged, "that divers goods or chattels of the plaintiff were in and upon the demised premises *with the leave and licence of the defendant*, and were liable to be seized and taken, &c. and afterwards divers of the said goods were lawfully seized and taken as distresses for arrears of rent due under the said indenture in respect of the said demised premises, and sold &c."

The defendant pleaded that "no goods or chattels of the plaintiff were at any time in and upon the demised premises with the leave and licence of the defendant, nor was any part of *such goods* lawfully seized or taken as and for a distress, or sold or disposed of as therein alleged."

Held, that the statement relating to the leave and licence was immaterial; and that the substance of the plea was, that the plaintiff's goods had not been seized; and that as the facts involved in the issue raised thereon had been found for the plaintiff, the verdict upon such issue should have been entered for him.

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fixtures, and stock in trade, and all the estate and interest of *Marks* and the plaintiff, as such assignees as aforesaid, and to pay the rent, and all rates, taxes, and outgoings payable for or in respect of the said premises aforesaid up to the 1st of *September* then next; and from and after that date the defendant did thereby agree to bear, pay, and discharge the rent, and all rates, taxes, and outgoings payable in respect of the said premises, and to indemnify and save harmless *Marks* and the plaintiff, and their and each of their heirs, executors, and administrators, lands, goods, chattels, and effects, of, from, and against the rents and covenants reserved and contained in such lease as aforesaid, and of and from all loss, costs, damages, and expenses which they might incur, sustain, or be put unto by reason of the non-payment of such rent or non-observance of such covenants, or any of them, in anywise. That the defendant thereupon entered into and upon the said demised premises, and became and was possessed thereof, and continued so possessed from thenceforth to the date of the declaration. That afterwards *Marks* died, leaving the plaintiff him surviving. That after the making of the said memorandum, and in the lifetime of *Marks*, and during the continuance of the term, and after the said 1st day of *September*, 65*l.* 12*s.* 6*d.* became due for rent of the premises, which the plaintiff and *Marks* were obliged to and did pay; and that part thereof, to wit, 21*l.* 14*s.* 7*d.* was for rent which became due after the said 1st of *September*. And after making a similar averment with respect to taxes paid by the plaintiff and *Marks*, part whereof, namely, 1*l.* 3*s.* 9*d.*, had accrued after the said 1st of *September*, the declaration alleged — that afterwards, and during the continuance of the term, and in the lifetime of *Marks*, divers goods and chattels of the plaintiff and *Marks* were in and upon the demised premises, *with the leave and licence of the defend-*

ant, and were liable to be seized and taken as and for a distress for rent due under the said indenture of lease, or for certain taxes due in respect of the said premises. That afterwards, and during the continuance of the term, divers of the said goods and chattels were lawfully seized and taken as distresses for arrears of rent due under the said indenture in respect of the demised premises, and sold and disposed of in that behalf; and that divers others of the said goods and chattels were lawfully seized and taken as and for distresses for divers other sums of money due in respect of the said taxes, the said rent and taxes having become due since the said 1st of *September* in the said memorandum mentioned; and that the plaintiff and *Marks* were, on those occasions, forced and obliged to pay, and did pay a large sum, to wit, 16*l.* 10*s.*, in order to release the said goods and chattels so distrained for such taxes as aforesaid; of all which said premises the defendant had notice and was called upon and requested by *Marks* and the plaintiff in the lifetime of *Marks*, and by the plaintiff after his decease, to pay the said several sums so paid as aforesaid, and to indemnify them respectively according to the said memorandum. Breach, that the defendant did not and would not pay the said sums, or indemnify.

Pleas: first, non assumpsit; secondly, so far as related to the said distresses for rent and the non-payment of the said sum of 16*l.* 10*s.*, that no goods or chattels of the plaintiff and *Marks* were at any time in and upon the demised premises *with the leave and licence* of the defendant; nor was *any part of such goods lawfully seized or taken as and for a distress, or sold and disposed of*, as therein alleged: concluding to the country. Issue thereon.

At the trial, before *Coltman J.*, at the sittings in *London* after *Hilary* Term, 1840, it appeared that the goods in question consisted of *Colnaghi's* furniture, which the

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plaintiff and *Marks* had allowed to remain in the private part of the house for the use of *Colnaghi*, who continued to reside there after the defendant had been let into possession of the shop.

No evidence was given that these goods were on the premises with the leave and licence of the defendant.

For the plaintiff, it was contended that the allegation in the second plea denying the leave and licence was immaterial.

On the part of the defendant it was admitted that the plaintiff was entitled to recover the two sums of 21*l.* 14*s.* 7*d.* and 1*l.* 3*s.* 9*d.* mentioned in the declaration as paid for rent and taxes accruing due after the date of the agreement with the defendant; but the latter disputed his liability to pay the sum of 128*l.*, which was proved to be the value of the furniture which was subsequently sold under a distress for rent, as well as the sum of 16*l.* 10*s.* also alleged in the declaration to have been afterwards paid by the plaintiff and *Marks* to redeem their furniture, when distrained for taxes, alleging that the defendant was not bound to indemnify the plaintiff with respect to those sums, as it was the plaintiff's own fault that the goods were left on the premises.

The jury having found, upon the second plea, that the plaintiff's goods had been distrained, but that they were not upon the premises with the leave and licence of the defendant, the verdict was entered for the plaintiff upon the first issue, for 167*l.* 8*s.* 4*d.*, and for the defendant upon the second issue; the damages on the first issue to be reduced to 22*l.* 18*s.* 4*d.*, in case the verdict for the defendant on the second issue could be sustained; leave being reserved for the plaintiff to move to have the verdict entered for him upon the second issue, in the event of the court being of opinion that the allegation of leave and licence was immaterial.

R. V. Richards in last *Easter* term having obtained a rule *nisi* accordingly,

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Swann now shewed cause. There is no ground for disturbing the verdict entered for the defendant upon the second issue. The second plea alleges, not that no goods of the plaintiff were distrained, but that none were distrained such as those mentioned in the declaration, namely, goods on the premises with the leave and licence of the defendant. The defendant says, that he agreed to indemnify the plaintiff against the rent of the premises, but not against rent to which the latter improperly subjected himself. The agreement must receive a reasonable construction, and cannot be held to extend to rent for which the plaintiff could not have been made liable, if he had not placed his property in a situation to be distrained. The defendant may be bound under his agreement to repay rent paid by the plaintiff, but not to indemnify him against any loss sustained by his goods being unlawfully upon the premises. The declaration avers, that the defendant entered under an agreement with the plaintiff; it must, therefore, be assumed, that the defendant was lawfully in possession, and consequently that the plaintiff had no right to place his goods upon the premises without the leave of the defendant, which leave is expressly negatived by the jury. It is said that the allegation in the declaration as to the leave and licence is immaterial, but it is submitted that, in the way in which the averment is worded, such leave and licence forms part of the description of the goods. If the plea had raised an immaterial issue, the application of the plaintiff should have been for judgment *non obstante veredicto*.

Richards, in support of the rule. The plea is good; and the issue raised thereon has been substantially found for the plaintiff. The allegation of leave and licence is

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wholly immaterial. The question is, whether the seizure of the plaintiff's goods is not a breach of the defendant's agreement to indemnify. If the defendant had performed such agreement, the goods of the plaintiff never could have been distrained.

TINDAL C. J. There cannot be a doubt that the merits of the case are with the plaintiff. The plaintiff agreed to assign to the defendant a lease of certain premises. No actual assignment was made, but the defendant was allowed to enter into possession under the agreement, part of such agreement being that, after the first day of *September* 1833, the defendant should pay the rent and taxes payable in respect of the premises, and indemnify the plaintiff against the rent and covenants reserved and contained in the lease. During the continuance of the defendant's possession, certain goods of the plaintiff, which had been left on the premises, were distrained for rent and taxes, which accrued after the 1st of *September*. The question for our consideration is, whether it is a material part of the issue raised upon the second plea, that these goods were upon the premises *with the leave and licence of the defendant*. That circumstance appears to me to be quite immaterial ; for as the plaintiff never parted with the legal interest in the premises, his goods must be presumed to have been lawfully upon the premises. This being so, the substance of the plea is, whether the distresses were satisfied out of the plaintiff's goods ; for, even supposing the leave and licence to be part of the description of the goods, you get rid of such description by shewing its immateriality. As the substantial part of the plea was proved, I think the verdict on the second issue must be entered for the plaintiff.

BOSANQUET J. The only difficulty I have felt during the argument has been a technical one, arising out of

the pleadings. The reasons given by the Lord Chief Justice have satisfied me that you may get rid of that difficulty. Although the defendant was let into possession, he still had no legal interest in the premises, and therefore it cannot be said that it was a trespass for the plaintiff's goods to be there. The substantial part of the plea is that denying that the plaintiff's goods had been seized and taken, as and for distresses, which has been found for the plaintiff.

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MAULE J. I also think that the verdict must be entered for the plaintiff under the leave reserved at the trial. The declaration set out an agreement, by which the defendant undertook to pay the rent and taxes for the premises in question, and to indemnify the plaintiff against such rent and taxes, and all losses to be sustained by him in consequence of their nonpayment. It further appears that the defendant has not paid the rent and taxes, and that the plaintiff has been damnified by his default; certain goods of the plaintiff, which were on the premises, having been taken for distresses. The declaration alleges that the goods were on the premises with the leave and licence of the defendant. This is denied by the plea, which also traverses that the goods were lawfully seized for distresses and sold, as averred in the declaration. Even supposing that the defendant had had the exclusive possession of the premises, I very much question whether he would not have been still liable to the plaintiff under his indemnity. It is not, however, necessary to decide that point; for it does not appear that the defendant had such exclusive possession as to make it wrongful for the goods to be on the premises without his leave. If, therefore, the plaintiff's goods were rightfully there, and were distrained, I cannot entertain a doubt that he has been damnified so as to make the defendant liable under his agreement of

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 ——— goods were not distrained or sold; and that having
 GROOM been negatived by the jury, the verdict should be en-
 v. tered for the plaintiff.
 BLUCK.

Rule absolute.

T. S. RICHARDS and Another v. M. P. HAY-
 WARD.

In a corre-
 spondence in
 which it is
 proposed to
 the defendant
 to go out as
 surgeon to
 the plaintiff's
 emigrant
 ship, it is
 stated that
 the ship be-
 longs to a
 certain class,
 and that the
 appointment
 must be sub-
 ject to the ap-
 proval of cer-
 tain commis-
 sioners. The
 proposal is
 accepted.

ASSUMPSIT. The declaration stated that before
 the making of the defendant's promise, the plain-
 tiffs had chartered a vessel called the *Orissa*, to convey
 passengers and goods on freight from *London* to certain
 parts beyond the seas, to wit, to *South Australia*, *Port*
Adelaide, and *Port Phillip*, and which vessel was then
 intended shortly to sail to the places above mentioned
 with a surgeon on board thereof, that thereupon, here-
 tofore, to wit, on the 21st day of *August* 1839, in
 consideration that the plaintiffs, at the special instance
 and request (a) of the defendant, would take out the
 defendant as surgeon for the voyage aforesaid, in and
 on board the said vessel, on certain terms, that is to
 say,—in case of the defendant's occupying a cabin in
 the cuddy, of and in the said vessel, for his sole use
 during the said voyage, the plaintiffs would charge him

Neither the quality of the ship nor the approval of the commissioners is a
 condition precedent to the obligation to go out as surgeon.

A representation that a ship "will carry emigrant labourers not over forty,"
 is satisfied if no more than forty labouring *men* are taken, although with their
 wives and children that number is exceeded.

A negotiation respecting an appointment as surgeon to a ship was held, under
 the circumstances, to have terminated in a complete contract.

(a) As to a request where the contract is executory, see *antè*,
 Vol. I. p. 265. 810.; *antè*, 530.

for his passage a certain sum of money, to wit, 52*l.* 10*s.* in lieu of the full and usual charge of 105*l.*, and in case of the defendant's making the said voyage in the said vessel in company with another person, and both occupying only one cabin in the cuddy of the said vessel, that the plaintiffs would charge him a certain sum of money, to wit, 168*l.* for himself and such other person, and deduct therefrom the sum of 52*l.* 10*s.* for the services of the defendant as such surgeon, — the defendant accepted the appointment and situation of surgeon for the said voyage, in and on board the said vessel so about to sail as aforesaid, and then promised the plaintiffs to sail in and on board the same, as such surgeon to the said vessel on the voyage aforesaid; and although the plaintiffs, confiding in the said promise of the defendant, were then, and thenceforth continually until the sailing of the said vessel as hereinafter mentioned, ready and willing to perform and fulfil the said agreement in all things on their part and behalf to be performed and fulfilled, and to take out the defendant as such surgeon as aforesaid, upon the terms aforesaid; whereof the defendant then had notice; and although the said vessel afterwards, to wit, on the 15th day of *October* 1839, sailed on the voyage aforesaid; yet the defendant did not nor would, although often requested so to do, perform or fulfil the said agreement on his part and behalf to be performed and fulfilled, and sail on the voyage aforesaid, in and on board the said vessel, as such surgeon as aforesaid, although the plaintiffs reserved for him such cabin in the cuddy of the said vessel for the said voyage, but wholly neglected and refused so to do; and thereby the plaintiffs not only lost, and were deprived of the services of the defendant as such surgeon in and on board the said vessel as aforesaid, and were put to great trouble and expense of their moneys in and about endeavouring to procure and procuring another surgeon

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to sail in and on board the said vessel as such surgeon on the said voyage, but were also forced and obliged for that purpose to engage and did engage a surgeon, to wit, one *J. Greenwood*, as such surgeon, at a greater and higher rate, and for greater fee and reward to him in that behalf, to wit, of 100*l.* more than the services of the defendant would have cost them, if the defendant had performed his said promise.

Second count, upon an account stated.

Pleas: first, non assumpsit; secondly, that the defendant did not accept the appointment and situation of surgeon for the said voyage, in and on board the said vessel so about to sail as aforesaid, *modo et formâ*; thirdly, that the plaintiffs were not continually until the time of the sailing of the said vessel ready and willing to perform and fulfil the said agreement in all things on their part and behalf to be performed and fulfilled, and to take out the defendant as such surgeon as aforesaid, upon the term aforesaid, nor did the plaintiffs reserve for the defendant such cabin in the cuddy of the said vessel for the said voyage, *modo et formâ*; fourthly, that the plaintiffs caused and promised the defendant to enter in the said agreement, and to promise as in the first count alleged, and the defendant was induced to enter into and to make the said agreement and promise, through and by means of the fraud carried, and misrepresentations of the plaintiffs. Verification.

The replication joined issue, upon the first three pleas, and took issue upon the fourth plea, by alleging that they did not cause, &c., nor was the defendant induced, &c., through or by means of the fraud, covin, or misrepresentation of the plaintiffs, *modo et formâ*.

By their bill of particulars the plaintiffs demanded 53*l.* as the amount of actual loss, in difference of passage money and expenses, sustained in consequence of the defendant having refused to perform on his part the

agreement, stated in the first count of the declaration to go out as surgeon in the *Orissa*, chartered by the plaintiffs to convey passengers and goods on freight from *London* to *South Australia*. Of this sum 52*l.* 10*s.* was claimed in respect of the difference of passage money, the plaintiffs having been obliged to allow to the surgeon employed to go out as surgeon in the vessel in the place of the defendant his whole passage money of 105*l.* instead of the sum of 52*l.* 10*s.*, which was to have been allowed the defendant as such surgeon out of his passage money; and 10*s.* the balance of the said sum of 53*l.*, was claimed in respect of the cost of advertising for another surgeon in the place of the defendant, and other petty expenses occasioned by such refusal of the defendant to go out as surgeon in the vessel.

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At the trial before *Maule J.*, at the sittings at *Guild-hall*, after *Hilary* term 1840, the plaintiffs, in support of the affirmative of the first three issues, put in the following correspondence in pursuance of a judge's order to admit under *Reg. H. 4. W. 4.*

The correspondence commenced with the following letter, addressed by the plaintiffs to the defendant at his residence at *Stroud*, on the 31st *July* 1839.

“ We merely write to inform you, that if you have not yet decided on a ship, we shall be happy to give you any particulars you can desire as to the accommodation in our ship the *Orissa*, which we shall dispatch early in *September* for *Ports Adelaide* and *Phillip*. The arrangements will be the same as those in the ‘*Caroline*’ (which vessel we sent from *Plymouth* fourteen days since), which were quite to the satisfaction of the passengers.

“ P. S. The *Orissa* is 490 tons, *British* built.”

The next letter was the following, addressed to the plaintiffs by the defendant on the 10th of *August*.

“ In answer to your letter of the date of *July* 31st,

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you will oblige me by writing me full particulars respecting the passage to *Adelaide* and *Port Phillip* in the *Orissa*, viz. what you would allow me as surgeon to that vessel; what kind of cabin I should have; whether there are emigrant labourers taken out, &c. I also wish to know your charge for a single person in best cabin; also the charge for two in one cabin.

“ I have several friends who intend emigrating to some part of the continent of *New South Wales* this autumn, and although I could not promise you even one passenger (were you to appoint me surgeon), but of course I should endeavour to prevail upon them to accompany me for the sake of society. If your fare is moderate I have little doubt but I could persuade one or two to sail in the *Orissa* if she is a well built and convenient vessel, &c. You will oblige me by returning an answer as soon as convenient.”

On the 12th of *August* the plaintiffs wrote to the defendant as follows: —

“ SIR, — We have to say in reply to your favour of the 10th current, that a gentleman has been proposed to us as surgeon to the *Orissa*, but that it is probable nothing will be settled immediately. Our intention is to conclude with whoever first accepts our terms, which we will proceed to state to you.

“ A cabin in cuddy for two persons (gentleman and wife), 150 guineas.

“ A cabin in cuddy for two persons (two gentlemen), 160 guineas.

“ A cabin in cuddy for one person (a gentleman), 100 guineas.

“ A cabin in cuddy for one person (a lady), 90 guineas.

“ We propose to give you a 100 guinea cabin, and allow you for your services as surgeon 50 guineas off same. The *Orissa* is A. 1, and all that a vessel should be. The provisions in cuddy or cabin equal to those

provided by us for the "*Caroline*," lately sailed. On this head you shall be satisfied. The duties of surgeon will be light, as we do not take (of emigrant labourers) over forty. We embark them at *Plymouth* towards latter end of *September*. In the other emigrant ships there will be from 200 to 300 labourers.

" Besides the 50 guineas allowance from us, there is an allowance from the commissioners, payable on landing in *South Australia*, of 8s. per head for each emigrant; any appointment we make must be subject to the approval of the *South Australian* commissioners.

" The last surgeon we appointed was Mr. *J. A.*, son of Colonel *A.*, of *S.* He paid us 100 guineas for his cabin, and for self and lady; that is, we allowed him 50 guineas from 150 guineas. Should you know any of his friends, we think they will say how pleased he expressed himself to be, that he took his passage in a vessel with few emigrants.

" P. S.—If you are married we should make you some proposal, as was accepted by Mr. *A.*"

On the 15th of *August* the defendant wrote as follows:—

" In reply to your letter of the 12th instant, I beg to say I shall be most happy to accept the appointment of surgeon to your vessel, the *Orissa*, which leaves *England* the latter end of *September*. And I consent to give you 40 guineas and my services as surgeon for the voyage (of course independent of the commissioners' pay), unless a friend accompanies me to *Adelaide*, when we should require only one cabin; then I should agree to your terms, viz. 160 guineas for both, deducting 50 guineas for my services; and I have every reason to think that at least one of my friends will go out with me.

" P. S.—I shall of course make final arrangements with you regarding my or our cabin in the *Orissa*,

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when I have seen and decided with my friends; and then I shall call and see you in town. You will oblige me by answering this early, and informing me what articles for cabin or berth, &c. I shall require to find myself. Of course surgical instruments, drugs, &c. you will provide for me."

On the 18th the plaintiffs wrote as follows: —

"We regret that the alteration you propose in terms, prevents our closing with you as surgeon to the *Orissa*, at least *till receipt of your reply to this*, which we trust will be immediate. We are so situated with another party, that we cannot alter the terms proposed in ours of the 12th current. As it is likely a friend will accompany you in the same cabin, it is really a pity you should have proposed any deviation. Your cabin fittings you will in a day or two arrange when in *London*. Drugs we find, but not surgical instruments. You, in case of need, must have your own for use. If you decide upon accepting the appointment, you will be pleased remit one third the amount of passage money.

"On our part we promise to do all in our power to make your appointment agreeable to you."

On the 21st of *August*, the defendant wrote to the plaintiffs from *Gloucester* as follows:

"In answer to your last letter, I beg to say that I will accept the appointment of surgeon to your vessel on the terms you propose, viz. 50 guineas, &c.; if I should not have a friend to accompany me, when, of course, it would be 160 guineas for both, &c. I should have answered your letter before, but a friend of mine was going to *London*, and proposed calling on you, but for some reason was prevented, as his stay in town was but for a few hours. I expect to be in *London Saturday or Monday*, when I will call on you and make *final arrangements*; for I cannot possibly do so sooner for many reasons. I am daily expecting to hear from some

friends who are going to *Australia* this autumn, and whom I have requested to accompany me."

The next letter was of the 5th of *September*, from the plaintiffs, as follows: —

"We expected to have seen you ere this. However it does not matter, as we shall not be able to get the *Orissa* off till the 25th from *London*. We think it right to give you an early intimation of this.

"P.S. Let us, if you please, hear in a day or two when you will be up, and if any of your friends accompany you."

Then followed a letter from the defendant of the 8th of *September*.

"My delay in answering yours of *Thursday* is owing to my being from home yesterday and *Friday*. In consequence of my receiving no answer to my last letter to you, dated *August 21st*, I, of course, concluded that you had made arrangements with the other party who had been proposed to you as surgeon to the *Orissa*, particularly as you required from me a deposit of one third passage money, and also an immediate reply to your letter of 16th instant, which I could not answer till the 21st; especially, too, as I observed afterwards in a *London* newspaper that your ship *Orissa* would sail punctually on the 15th of *September* (whereas, in your second letter, I understood she would not leave till the end of *September*), and consequently I should not have had time to prepare myself to join her. I regret exceedingly that I should have caused you any inconvenience regarding the surgeoncy to the *Orissa*, but I certainly must now decline the appointment."

The correspondence closed with the following letter from the plaintiffs, dated 9th of *September* 1839:

"We were much surprised on receiving your letter dated 8th of *September*, to find you declined going as surgeon to the *Orissa*, and the more so on account of

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the explanation you offer. We have, under advice, to inform you that we hold the situation for you under your letter of the 21st of *August*, and shall, in the event of your declining to go in the vessel, hold you liable for all damages we may sustain through the same. Should you not have a copy of your own letters they shall be sent you on application. We leave the *St. Katherine's Docks* early in *October*, not later, we believe, than the 4th."

On the 14th of *September* 1839 the defendant was informed by the plaintiffs' attorney that the *Orissa* would leave the docks on the 14th of *October*, and that unless within a week he withdrew his letter and remitted one third of the passage money, the plaintiffs would proceed to fill up the appointment, and hold the defendant responsible for any loss.

To this application no answer was returned.

No evidence was called by the defendant to support the fourth plea ; but it was contended by *Whateley* that the plaintiffs ought to be nonsuited on the ground of variance, the contract declared on being absolute, that evidenced by the correspondence, conditional. The learned judge overruled the objection, but gave leave to the plaintiffs to amend the declaration by qualifying the statement in the declaration of the terms of the consideration by inserting the words "amongst other things," and to the defendant, to move to enter a nonsuit, in case the court should consider that there was a variance, and that such variance was too material to be a proper subject for amendment. The jury having returned a verdict for the plaintiffs, damages 52*l.* 16*s.*,

Wilde, Solicitor General, in *Easter* term last, obtained a rule nisi for entering a nonsuit, on the ground that the correspondence shewed that the matter had rested

merely in negotiation, and that, if it shewed any contract, it was not that declared upon.

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Channell Serjt. now shewed cause. The rule for a nonsuit was moved for upon two grounds; but the leave reserved applies to the latter of those grounds, variance, only. The first ground of variance insisted on at the trial was, that, in the contract proved, it was a condition precedent, that not more than forty emigrant labourers should be taken out, but that such qualification of the contract was not noticed in the declaration. It is submitted that the contract was absolute; and that it was proved as laid. By the defendant's letter of the 5th of *September*, he accepted the offer in the alternative. The terms of that letter would be well understood by both parties, the alternative having been suggested before. It is no objection that the defendant did not at that time remit the passage money. A remittance would probably have been made if the acceptance of the engagement had not been so worded as to leave it open to the defendant afterwards to decide whether he went out alone. Nothing can be clearer than that here there was a distinct offer and as distinct an acceptance of the appointment. If any new terms had been introduced it might have been necessary that the acceptance should be repeated; but none were proposed. The defendant puts his refusal upon an extraordinary ground: "Particularly as you required from me a deposit of one third passage money, and also an immediate reply to your letter of the 16th instant, which I could not answer till the 21st." Yet in that very letter of the 21st, which he thus represents as being too late, he says, "I accept the appointment of surgeon to your vessel on the terms you propose." The substance of the contract was, the amount of passage-money to be charged, and the amount of deduction to be made in respect of the defendant's services as sur-

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geon to the vessel. All other matters were merely collateral, and do not affect the merits of the case. The declaration was therefore capable of being amended. But it is submitted that no amendment was necessary, the alleged omissions being merely in matters of representation, or the subject of minor arrangement. (a) The statement of the class and tonnage of the *Orissa* was perfectly immaterial. Neither were the plaintiffs bound to obtain the approval of the commissioners:

Bompas, contra, in support of the rule. It is necessary to look to the position which these parties were in at the time the correspondence between them took place. The plaintiff, being in the country, first writes up to inquire. The letters of the 15th, 18th, and 21st are all that it will be necessary to consider. It will not be contended that any contract was entered into after the 21st. [*Maule J.* The subsequent correspondence consists in getting further apart. *Tindal C. J.* I think the letter on the 21st overleaps that of the 15th. *Maule J.* It is not suggested that the contract was complete on the 15th.] To make a complete contract there should have been the same power to sue in the defendant as in the plaintiffs; unless both parties were bound there could be no agreement. There was nothing to prevent the plaintiffs from writing on the 22d, that all the cabins were engaged, and they might have concluded a bargain with another surgeon as early as the 20th. [*Tindal C. J.* That was not a question of law, it was for the jury to say whether there had been a waiver. An alteration not objected to must be taken to have been agreed to.]

The contract was misdescribed in the declaration. In the letter of the 12th of *August*, it is said the *Orissa* is A. 1. That statement, as well as the previous statement,

(a) *Vide post*, 588. (a)

the *Orissa* is 490 tons burthen, amounted to a warranty, the omission of which in the declaration could not have been made the subject of amendment under the 3 & 4 *W. 4. c. 42. s. 23.* [*Maule J.* The statement implies that some person has entered the *Orissa* as a vessel of that description.] The vessel might have been insured at a different rate in consequence of that description. Such insurance would have been void if it had turned out, as the fact here was, that the vessel was not A. 1., and was not of the burthen described; yet if this does not amount to a warranty, the defendant would have no remedy even against the plaintiffs for the loss of his insurance contract.

The approval of the *South Australian* Commissioners appears by the letter of the 12th of *August* to have been a condition precedent. The clause in the letters of the 12th of *August*, which states that the appointment was to be subject to their approval, ought to have been stated as part of the contract. [*Maule J.* It is like saying you must get proper clothes for the voyage. *Tindal C. J.* If a condition at all, it is a condition subsequent, a nonperformance of which must be shewn by the other party. (a) Supposing such an averment to be necessary, the declaration might now be amended on payment of nominal costs.]

In the letter of the 12th of *August* it is said, "The duties of the surgeon will be light, as we do not take of emigrant labourers over forty." That was a condition precedent which should have been set out as part of the contract. It would then have been necessary to allege performance of that condition, which allegation the defendant might and would have traversed, as a greater number were taken out. [*Tindal C. J.* That was matter of representation, not amounting to a condition; we must

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(a) See *Wynne v. Wynne*, *antè*, p. 8.

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look at the substance of the contract. *Maule J.* The number of it might, no doubt, have been made part of the contract, that not more than forty labourers should be taken out by the *Orissa*, the question is whether the contract to be extracted from the letters does in fact make this statement a part of the contract.] The variances between the contract proved and the contract declared upon could not properly be amended, according to the decision of this court yesterday in *Smith v. Knowelden*. (a) Nor would the introduction of the words “amongst other things” have removed the difficulty; the necessity of averring performance would still have remained. (b) An action for not going before the *South Australian* commissioners for their approval would have been an action of a totally different form from the present. There was no contract to go until the approval of the commissioners had been obtained.

TINDAL C. J. The plaintiffs have declared upon a contract, that in consideration the plaintiffs would take out the defendant as surgeon for a voyage from *London* to *South Australia* in a certain ship on certain terms, the defendant accepted the appointment and promised the plaintiff to sail in the same as such surgeon on the said voyage, but that the defendant wholly refused so to do. The defendant has pleaded non assumpsit; and that he did not accept the appointment, together with other pleas upon which no point was raised. Two objections are raised to the plaintiffs’ right to retain the verdict which has been found for them: first, it is said that there was no contract, and all that passed between the parties proceeded no further than a negotiation for a contract, and that, therefore, the defendant was entitled to a nonsuit upon the first issue. The second objection

(a) *Antè*, 561.

(b) *Ughtred’s case*, 7 Co. Rep. 9 b.

was, that between the contract declared on and the contract given in evidence there was a variance, and of such a nature as not to be amendable under 3 & 4 W. 4. c. 42. s. 23.

As to the first objection, it is to be observed that this is not a contract drawn up in express terms, but one which is to be collected from a correspondence, the terms of which are to be considered in connection with the situation of the parties at the time at which the different letters were written. The case for the plaintiffs as well as that for the defendant was put upon that ground. It was a question for the jury whether the parties had finally agreed or not; and I think they came to a correct conclusion. The plaintiffs' letter of the 16th of *August* proposes terms which vary a little from those contained in the defendant's letter of the 15th, and it requests the defendant, if he decides upon accepting the appointment, to remit the plaintiffs one third of the passage money. In answer to which the defendant writes on the 21st, "I beg to say that I will accept the appointment of surgeon to your vessel on the terms you propose, viz. fifty guineas, &c. if I should not have a friend to accompany me, when of course it would be 160 guineas for both, &c. I should have answered your letter before, but a friend of mine was going to *London*, and proposed calling on you, but was prevented. I expect to be in *London Saturday or Monday*, when I will call on you and make *final arrangements*." It is insisted that as the defendant did not remit the one third of the amount of the passage money, there was a non-compliance with a condition precedent to the completion of the contract. This does not appear to me to be a sound argument. Supposing the plaintiffs might have insisted upon the remittance as a condition precedent, it does not follow that they might not waive the performance of that condition; and from the uncon-

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ditional language in which the defendant accepted the appointment, it is evident that he contemplated that the plaintiffs might not insist upon an immediate remittance. Then it is said that there could have been no complete contract, because the letter of the 21st of *August* speaks of the *final arrangements* as yet to be made. It appears to me that that part of the letter refers only to the minor arrangements connected with such a voyage. (a) I cannot think that the defendant was dealing very fairly with the plaintiffs in saying that he concluded that they had made other arrangements. (b)

The next question is, whether the contract was misdescribed, and if so, whether any of the variances insisted on were of such a nature as not to be amendable under the statute. First, it is said that the declaration should have stated as part of the contract, that the *Orissa* was a ship that was A. 1. It appears to me that this was mere matter of representation, not amounting to a warranty; and that the only effect of such representation was to give an action to the defendant for any damages which he might sustain in consequence of such representation turning out to be false, provided it could be shewn to have been fraudulently made. (c) I do not think that it can be inferred from the correspondence that the parties contemplated a warranty.

I am also of opinion that the statement with respect to the forty emigrant labourers (d) was mere matter of representation, and did not amount to a warranty.

Then it is said that the contract should have been declared upon as being subject to the condition of approval on the part of the *South Australian* commis-

(a) Besides which, it was to be finally arranged whether the defendant was to go out with a companion or alone:

(b) *Vide antè*, 581.

(c) *Vide antè*, 475. (a), 507.

(d) *Antè*, 579.

sioners. (a) That approval, however, was to be obtained subsequently to the contract, and before the defendant entered upon the duties of his appointment. The appointment would, therefore, be defeasible by the non-performance of the condition subsequent. It is not necessary for the party who pleads a conveyance or a contract to set out a condition which goes in defeasance of such conveyance or contract. If such condition exist, it should be stated by the other side, with an averment of the non-performance of the condition; agreeably to the known distinction between conditions precedent and conditions subsequent. (b)

I am of opinion that there was no necessity for any amendment of the declaration; and that the verdict ought not to be disturbed.

BOSANQUET J. This is an action upon a contract to be collected from letters which have passed between the plaintiffs and the defendant. I think the jury have rightly found that these letters amount, not to a mere negotiation, but to a contract.

Then it is said that, supposing a contract to have been made, there were several circumstances mentioned in the course of the negotiation which formed part of the contract, and ought to have been stated in the declaration. Some of these circumstances do not go to the whole consideration of the defendant's promise, and therefore cannot form conditions precedent. Suppose the vessel had turned out to be 489 tons burthen instead of 490, the inaccuracy of the statement might, under certain circumstances, have given the defendant a cause of action, if he had sustained any damage in consequence of the mis-statement, but would not justify a refusal to go out as surgeon to the vessel.

(a) *Ante*, 579.

(b) See *Wynne v. Wynne*,
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I think the term “emigrant labourers” applies to men only; and, if so, less than forty men were taken out. But, supposing forty-one men had been taken out, I think that no objection could be raised to the declaration on that ground, because I am of opinion that the number of labourers was merely matter of representation. (a)

Then it is said that the contract was not absolute, as stated in the declaration, the appointment being defeasible by the non-approval of the *South Australian* commissioners; but the contract was first to be made, and it was made, between the parties: the approval of the commissioners was to be obtained afterwards. If such approval was a condition at all, it was a condition *subsequent*; and as a condition subsequent it would not be necessary to set it out in the declaration.

I am therefore of opinion that a contract was proved, and that that contract was truly stated in the declaration.

MAULE J. The defendant appears to have made a hard bargain with persons better acquainted than himself with the terms on which such services were to be obtained. It is clear that they could not get another surgeon upon the same terms (b) as they had made with the defendant. That could be no defence at the trial; and his counsel set up several defences which he would never have thought of.

The first question is, whether there was evidence to go to the jury of an actual contract. The plaintiffs’ case was not a case of a written contract to be construed by the court. It was one in which it was the business of the jury to infer, from all the circumstances

(a) *Suprà*, 588.

(b) It was stated at the trial that the defendant was arrested at *Gravesend*, on board the

Rajasthan, in which he was engaged as surgeon, on the same terms as the plaintiffs paid to *Greenwood*.

of the transaction, whether there was a contract, and what that contract was. The defendant's letter of the 21st of *August* was as conclusive an acceptance as can well be conceived. A contract having been proposed by the plaintiffs and accepted by the defendant, nothing more was required. It was for the jury to say whether the words "final arrangements," meant the concluding of a contract, or referred to minor arrangements (a), such as the defendant choosing his berth on the star-board or larboard side of the ship.

It was for the jury to say whether the statement that the *Orissa* was A. 1., formed part of the contract. If I had been on the jury, I should have said that it did not. If the plaintiffs had *deceived* the defendant with respect to the class to which the ship belonged, or as to the amount of her tonnage, and the defendant had sustained damage in consequence of such false description, an action would have lain against them; but I think the representation was not a warranty, and therefore formed no part of the contract.

With respect to the number of emigrant labourers, I think it was a question for the jury, whether that statement was intended as a warranty. If it was a question for our determination, I should have no doubt that it amounted to nothing more than a representation. Whether the term "emigrant labourers" excluded women and children, was also a question for the jury; and it is one which admits of little doubt. But even if the whole sixty-three were to be considered as labourers, it would make no difference, so far as this action is concerned, supposing the statement to be merely matter of representation.

With regard to the engagement to supply drugs, if the plaintiffs had omitted to supply them, the defendant

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(a) *Vide ante*, 588.

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would have had a good defence to an action for not administering them.

The plaintiffs told the defendant that his appointment would be subject to the approval of the *South Australian* commissioners: and being so informed, he entered into the contract. In case such approval had been withheld, that fact might have been an answer to an action by the plaintiffs against the defendants for not proceeding on the voyage; and it certainly would have been an answer to an action by him against them, for not allowing him to go out with the vessel. (a)

I am of opinion that a contract was proved, and that the contract so proved was complete and final.

Rule discharged.

(a) As to the difference between conditions precedent and conditions subsequent, see *Wynne v. Wynne*, *antè*, p. 8. *The Fishmongers' Company v. Staines*, *post*, T. T. 1842. And as to the analogous distinction

in the law of *France* between *conditions suspensives* and *conditions résolutoires*, see *Pothier, Traité des Obligations*, No. 202. and No. 224., &c., *Code Civil*, No. 1181, 2. No. 1183, 4.

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IN THE EXCHEQUER CHAMBER.

(Error from the C. P.)

YOUNG v. TURING, Bart., and Others.

10. B. 174.

ASSUMPSIT, by the defendants in error against the plaintiff in error, on a policy of insurance on the ship *Eliza*, valued at 8000*l.*, “at and from *Rotterdam* to port or ports, place or places in *Java* ^{and} _{or} *Sumatra*, backwards and forwards, and forwards and backwards, in any rotation, while there, and thence to a port of discharge in *Holland*.” The declaration, after setting out the policy, averred that, on the 3d *February* 1836, the said ship departed and set sail from *Rotterdam*, on the voyage in the said policy mentioned, and that whilst she was proceeding on her said voyage, to wit, on the 5th *February* in the year aforesaid, she was thrown, on the *Goodwin Sands* and plundered. She was ultimately removed to *London*, and notice of abandonment was given to the underwriters. It was proved that, at the time she was cast away, she was worth 5833*l.*, that her value as she lay was 700*l.*, and that the salvage was 420*l.* It also appeared in evidence, that the expense of repairing the ship in *England* would have been 4615*l.*; that if she had been entitled to an *English* register she would have been worth, when repaired, from 4500*l.* to 4700*l.*; and that, if she had been a *British* ship, it would have been prudent for a *British* owner to repair her. It was proved by *Dutch* witnesses that the expense of repairing her in *Holland* would have been far greater, and that her value, when repaired in *Holland*, would not have exceeded 2915*l.*; and that the trading companies in *Holland* will not employ a vessel that has been stranded in the manner in which this vessel was stranded, however perfectly she might have been repaired, and that this circumstance would have affected her value in *Holland*.

The judge told the jury that, in considering whether this was the case of a partial or a total loss, they ought not to take into account the value stated in the policy, and that, in considering the same question, they ought to look at all the circumstances attending the ship, and to judge whether, under all those circumstances, a prudent owner, if uninsured, would have declined to repair the ship; and that, if so, they might find it a case of total loss.

Held, that this direction was right.

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cast, and wrecked upon certain sands, and thereby was broken and bulged; and that, after the said ship was so wrecked and lost, and whilst the said ship was lying on the said sands as aforesaid, certain thieves and persons to the plaintiffs unknown, unlawfully and feloniously did steal, &c., divers parts of, and divers materials belonging to the said ship, and did then wrongfully and unlawfully cut, break, damage, and spoil the said ship, and the masts, &c. thereof, whereby the said ship became and was wholly lost to the plaintiffs, &c.

The defendant below brought into court 22*l.* 17*s.* 6*d.*, denying that the plaintiffs below had sustained damages to a greater amount; upon which plea the plaintiffs below took issue.

At the trial before *Tindal* C. J., at the sittings at *Guildhall* after *Hilary* term, 1836, it appeared that the plaintiffs below resided, and carried on business, in *Holland*, as merchants and shipowners, under the firm of *Turing* and *Tavenraat*; that the *Eliza* was a *Dutch* ship, and was their property; that the defendant below resided at *Glasgow*, and carried on business as a merchant and underwriter there; that the fact of the *Eliza* being a *Dutch* ship was known to the defendant below before he signed the policy; that the *Eliza* sailed from *Rotterdam* on her voyage to *Batavia*, in the island of *Java* (the voyage in the policy mentioned), on the 3d *February*, 1836, and early in the morning of the 5th *February* she struck upon the *Goodwin Sands*, and remained there until about three o'clock in the afternoon of the 6th *February*, when she was deserted by the crew for the salvation of their lives; that the vessel, whilst lying aground on the *Goodwin Sands*, was plundered of the greater part of her stores and rigging, and her masts cut away by certain persons unknown; that she was got off, having suffered considerable damage in addition to the loss of her masts, and was towed into

Ramsgate harbour, and notice of abandonment given to the underwriters (which was not accepted); that she was in the month of *May* towed by a steam-boat round to *London*, for the purpose of being surveyed in a dry dock there, to ascertain the extent of the injury she had suffered, in about eighteen hours, without any thing being necessary to be done to her except a temporary rudder; and that after the arrival of the ship in *London*, she was put into a dry dock and surveyed by the surveyors of both parties, and was afterwards put into the *Commercial Docks*; where she lay afloat at the time of the trial.

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It was further proved, that at the time of her striking upon the *Goodwin Sands*, the ship with all her stores and outfit for the voyage was worth about 5833*l.* sterling; that though she sustained considerable damage whilst upon the *Goodwin Sands*, she never ceased to exist, in specie, as a ship, and that she might have been repaired in *England* in six weeks as completely as aforesaid, for a less sum than her value at the time of her first sailing upon her voyage; and when she was upon the *Goodwin Sands*, that the expense of salvage of the ship amounted to 420*l.*; and that the ship, as she lay, to sell either in *London* or *Holland* for the purpose of being broken up, was worth about 700*l.*

Two *English* witnesses, called on the part of the plaintiffs below, swore that the expense of repairing and refitting the ship in *England*, would have been 4615*l.*; and if she had been an *English* ship, and entitled to a *British* register (which she was not), when so repaired and refitted, she would have been worth from 4500*l.* to 4700*l.* They also gave it as their opinion, that any prudent owner, uninsured, would have repaired her if she had been a *British* ship; and that when repaired, the ship would have been quite as good, in all respects, as before

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the accident, and quite as fit to prosecute her voyage to *Batavia*.

Several *Dutch* witnesses then swore that the expense of repairing and refitting the ship in *Holland* would be from 4580*l.* to 6000*l.*; and that the ship, when so repaired and refitted, would be worth in *Holland* between 2080*l.* and 2915*l.* And these *Dutch* witnesses also gave it as their opinion that, in the state in which the ship was, she could not have been repaired so as to have been made as good for the purposes of navigation as before the accident.

The defendant below called some *English* witnesses, who stated that the expense of repairing and refitting the ship in *England* would be about 3530*l.*, and when repaired, the ship, if she had been a ship entitled to a *British* register, would be worth 5500*l.*; and the same witnesses also swore, that had she been a *British* vessel, it would have been a prudent and proper course for the owners to have repaired her; and that her value, when repaired, would have exceeded the cost of the repair.

It was also proved that, after having been stranded, she could not have been sold in *Holland* for as much as the cost of her repair, whether she was repaired there or in *England*, although the cost of completely repairing and restoring her in the best possible manner would be less than her value at the time of the accident and of the commencement of the voyage.

It was likewise proved, that a ship that had been stranded in the manner the *Eliza* had been, loses her character in *Holland*, and is reduced from the first to a lower class, though she may have been repaired as completely as possible; that it is there considered that a ship that has been thus stranded cannot, on account of the general straining she must have received, be repaired so as to be as good as before the stranding;

and that the *Dutch* trading companies would not employ a ship after she had been stranded.

It was further proved, that the cost of repairing the *Eliza* in *England* would be less than that of repairing her in *Holland*, and less than her value at the time of the commencement of the voyage and of the stranding; but that she could not be sold in *England*, being a *Dutch* ship, for as much as the cost of the repairs; but that she would have sold in *England* for as large a sum after the repairs had been done, as she would have fetched in *England* if she had come straight from *Holland* to *England* and had been put up for sale and sold, and no accident whatever had happened.

For the defendant below it was insisted, that the above evidence only entitled the plaintiffs below to recover against him for a partial, and not for a total loss.

His lordship told the jury, that in considering whether the loss was a total or a partial loss, they were not to take into their consideration the circumstance of the ship being valued at 8000*l.* in the policy.

Whereupon it was insisted, that the circumstance of the ship being valued at 8000*l.* was a material circumstance for the jury to take into their consideration upon the question, whether the loss was total or partial; and that if the ship, after the stranding, remained in specie as a ship, and could be repaired so as to be as good as she was before the accident for the purpose of navigation, and of the voyage in which she was engaged, for a sum less than the value of the ship at the commencement of the voyage, the loss was partial and not total.

His lordship further told the jury, that they were to take into their consideration the cost of the repairs, on the one hand, and, on the other, what would be the intrinsic value of the ship to the owner under all the

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circumstances attending her after she was repaired; and that they were to say whether the owner of this ship, being a man of prudence and discretion, and uninsured, would, under all the existing circumstances, have repaired his ship or not; that if a prudent and discreet owner, being uninsured, would have repaired the ship, the plaintiff below ought to have done so, and the loss in that case was only a partial loss; and if such person would not have repaired his ship, the loss was a total loss.

Whereupon the counsel for the defendant below excepted to this opinion, and insisted that the circumstances of the plaintiff below having been domiciled in *Holland*, and of the ship being a *Dutch* ship, were not material for determining whether the loss was total or partial; and that the jury ought not to consider what would be the value of the ship to such owner.

The Lord Chief Justice, however, directed the jury that they were to take those circumstances into their consideration together with the other facts proved in the case, and so left the case to the jury. The jury having returned a verdict for the plaintiffs below, the defendant below brought a writ of error.

The errors assigned were: that the Chief Justice told the jury, that in considering whether the loss was a total or a partial one, they were not to take into their consideration the circumstance of the ship being valued at 8000*l.* in the policy, although she might have been repaired in six weeks, so as to be quite as good in all respects as before the accident, and quite as fit to prosecute the voyage for which she was insured, for a sum considerably less than 8000*l.*; and that they were to take into their consideration the cost of the repairs on the one hand, and on the other, what would be the intrinsic value of the ship to the owner under all the circumstances attending her after she was repaired;

and that they were to say whether the owner of the ship, being a man of prudence and discretion, and uninsured, would, under all the existing circumstances, have repaired his ship or not; that if a prudent and discreet owner, being uninsured, would have repaired the ship, the plaintiffs below ought to have done so, and the loss in that case was only a partial loss; but if such person would not have repaired his ship, the loss was a total loss; and that, in estimating the value of the ship, and whether the loss was total or partial, the jury were to take into their consideration the circumstances of the plaintiffs below having been domiciled in *Holland*, and the ship being a *Dutch* ship, together with all the other facts proved as aforesaid; and that the jury ought to consider what would have been the value of the ship to such owner: whereas the circumstances of the ship being a *Dutch* ship, and the owners domiciled in *Holland* — and that in *Holland* a vessel, if stranded, was considered incapable of repair, so as to make her as good as before the stranding; though in fact she might be repaired so as to make her quite as good as before the stranding; and that, in *Holland*, a ship if stranded, though afterwards repaired so as to make her quite as good for all purposes of navigation, and of the voyage she was to perform, as she was before and at the time of the stranding, lost her character as a ship, and was reduced to a lower class, — ought not to have been taken into consideration by the jury in forming their opinion of the intrinsic value of the ship, and whether she was or was not worth repairing, nor whether the loss was total or partial.

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The case was argued by *Wightman* for the plaintiff in error, and by *W. H. Watson* for the defendants in error.

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Lord ABINGER C. B. now delivered the judgment of the court.

This was an action on a policy of insurance at and from *Rotterdam* to *Java* and *Sumatra*, and back again to a port in *Holland*, upon the ship *Eliza*, valued at 8000*l.* In the course of her voyage she was stranded on the *Goodwin Sands*, and plundered. She was afterwards removed, and brought first to *Ramsgate* and then to *London*. The underwriters had notice of abandonment. It appears by the evidence set forth in the bill of exceptions, that, just before the time when the ship was cast away, she was worth 5833*l.* sterling; that her value as she lay was 700*l.*; and that the salvage was 420*l.* Two *English* witnesses deposed that the expenses of repairing the ship in *England* would be 4615*l.*; that if she had been entitled to a *British* register, she would have been worth, when repaired, from 4500*l.* to 4700*l.*; and that if she had been a *British* ship it would have been prudent for a *British* owner to repair her.

Several *Dutch* witnesses stated that the expense of repairing her in *Holland* would have been far greater; and that her value when repaired in *Holland* would, at the outside, have been 2915*l.* The defendants' witnesses do not materially vary this evidence; but witnesses were called to shew that the trading companies in *Holland* will not employ a vessel that has been stranded in the manner in which this ship was stranded, however perfectly she might have been repaired, and that this circumstance affects her value in *Holland*.

The Chief Justice, in summing up, told the jury that in considering whether this was the case of a partial or a total loss, they ought not to take into account the value in the policy. He also told them that in considering the same question they ought to look at all the circumstances attending the ship, and to judge whether, under all those circumstances, a prudent owner, if un-

insured, would have declined to repair the ship ; and, if so, they might find it a case of total loss.

To this charge of the Chief Justice two objections were taken, and are made the subject of this bill of exceptions. The first is, that he ought to have told the jury that, in determining whether the loss was total, they ought to take into their consideration the estimated value of the ship in the policy.

I am not aware of any case or principle in the law of insurance which makes the estimated value in the policy a circumstance on which the question of total or partial loss ought to turn. The agreed value in the policy of the subject insured is intended to save the expense and doubt that may attend the investigation of value, as affecting the *quantum* of compensation only. It may operate, according to events, to the advantage or detriment of either party ; and, where no fraud exists, both are bound by it. We are of opinion that there is no ground for the first exception.

The second exception is, that the Chief Justice ought not to have directed the jury to take into their consideration all the circumstances that affected the ship ; and that he ought to have instructed them to lay entirely out of their consideration the national character of the ship, and the consequences resulting therefrom.

We cannot agree to the propriety of this exception. The Chief Justice has laid down the usual and recognised rule, that the jury ought to consider, whether, under all the circumstances attending the ship, a prudent owner, if uninsured, would have repaired the vessel. Now, to the value of the repairs must be added her value as she lay in the dock ; that is, to 4615*l.* must be added 700*l.*, making 5315*l.* as the cost. Upon which the *Dutch* witnesses say her value in *Holland* would, on the outside, not have exceeded 2915*l.* The *English* witnesses make the amount of the repairs less ; and they

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say, had she been a *British* ship, with a *British* register, she would have been worth more than the repairs; and that, in that case, it would have been the interest of *British* owners to have repaired her, implying that, not having a *British* register, her value would not have equalled the repairs, and that it would not have been prudent in the plaintiffs to have repaired her. Now the effect of this evidence is, that the ship, when repaired, would not have been worth the value of her repairs either in *England* or in *Holland*. It does not appear that she would have been worth more any where else. Is it, then, to be contended that the jury are not to attend to the circumstances of the value of the ship when repaired? Has it ever been doubted that the value of a ship, when repaired, is an important criterion to determine whether she ought to be repaired or not after being damaged? or that, if the amount of repairs greatly exceed the value they will confer on the ship, the assured may abandon and claim a total loss? But it is said that the jury have no right to look at the circumstances that she was a *Dutch* ship, and that, by the usages that prevail in *Holland*, her value, when fully repaired, would nevertheless, in consequence of her disaster, be less than the amount of her repairs. For the same reason it might be contended that the jury ought to lay out of their consideration that she was *not* a *British* ship, and that therefore her value in *England*, when repaired, would be less than the cost of repairs, not being entitled to a register. The substantial fact is, that her value, when repaired, is less than the cost. The reason of the fact is, in the one case, the want of a *British* register, in the other, the usage of trade in *Holland*, which would prevent any body from giving a price for her equal to the repairs. Both these circumstances existed, and affected the ship, before the policy. Surely, if the question of her value when repaired be material,

the jury may look at the reasons which are alleged to impair or increase the value. One witness says she would not sell in *London* for one half of the cost of repairing her. Another says she would not sell for half the cost in *Holland*. If this evidence be admissible at all, may not the witnesses go on to allege the reasons of their opinion in both cases? Suppose that, in giving evidence of her value, the witnesses had proved that for different reasons, peculiar severally to each maritime state in *Europe*, but all existing at the time of the insurance, the ship, when repaired, could not have been sold at all, or could only have been sold for a price next to nothing, could it be gravely alleged that the jury could not take this into their consideration — because the underwriters know nothing of the laws or usages of the other maritime nations besides their own? That proposition, viz. that the underwriters are not presumed to know the usages or laws of foreign states, has, indeed, been urged by the counsel for the plaintiff in error beyond what is consistent either with reason or practice. The underwriters upon a foreign ship or a foreign voyage are presumed to know the usages and the laws which affect that ship or that voyage. But if the proposition were true to any extent, it would have no place in this argument; for the question is, not about their knowledge real or presumed, but about a fact, which, whether they knew it or not, affects the value of the ship. If, indeed, the depreciated value of the ship had arisen from any circumstance occurring after the policy was effected, and wholly unconnected with the perils insured against, — such as a new law or regulation affecting trade or shipping, — the case would have presented a question well worthy of consideration, upon which, however, it is unnecessary to offer any opinion. Where such circumstances occur, it may be necessary to qualify the proposition, — that if a prudent

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owner uninsured would not repair the vessel, it would be a total loss. But, as the case now stands, if the jury are to lay out of their consideration all the previous circumstances that may eventually affect the value of a *Dutch* ship, they must, by the same rule, disregard all the circumstances that may affect the value of a ship of any nation. By what criterion, then, are they to judge of the value of any ship? Or how can they receive any evidence of the value at all, if they may not sift the grounds and reasons of the opinions of witnesses? The argument pushed to its full extent, presents to them nothing but a ship capable of being repaired and put into as good a plight to swim as before, but, abstracted from all the circumstances which are connected with her, and which affect her value; and consequently instead of considering these circumstances, they ought, upon a question whether a prudent owner would repair, to turn their attention to no other circumstance but the cost of repairs and the original value of the ship when insured. Whereas, in *Milles v. Fletcher* (a) Lord Mansfield says: "If she had been repaired at *New York* the expense might have exceeded *what she would have sold for on her return to London.*" This case, and all the others which follow on the same subject, will be found to refer to the actual price of the ship when repaired, and not to her original value.

There is one plain way of considering this question: If the underwriters had accepted the abandonment, would they have repaired the ship themselves, or would

(a) 1 *Dougl.* 231. 235., where what Lord Mansfield is stated to have said is this: — "As to the ship, it was certainly better to sell her than bring her to *London*. There was no crew belonging to her, and she had no cargo. Even

if all the cargo had been left, the expense of repairs would have exceeded the freight. If she had been brought home, the expense of bringing her might have been more than what she would have sold for in *London.*"

they not have taken into consideration that she was a foreign ship, and could not obtain a *British* register; and that she was a *Dutch* ship, and could not be advantageously sold in *Holland*, because, under the circumstances, the *Dutch* trading companies would not employ her; and, finally, that the exclusive laws of all other maritime states would affect her value in each? And if they necessarily would and must have considered all these things,—which would have led them to sell the ship for 700*l.* rather than repair her,—the assured and the jury are equally entitled to take them into their consideration.

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circumstances attending her after she was repaired; and that they were to say whether the owner of this ship, being a man of prudence and discretion, and uninsured, would, under all the existing circumstances, have repaired his ship or not; that if a prudent and discreet owner, being uninsured, would have repaired the ship, the plaintiff below ought to have done so, and the loss in that case was only a partial loss; and if such person would not have repaired his ship, the loss was a total loss.

Whereupon the counsel for the defendant below excepted to this opinion, and insisted that the circumstances of the plaintiff below having been domiciled in *Holland*, and of the ship being a *Dutch* ship, were not material for determining whether the loss was total or partial; and that the jury ought not to consider what would be the value of the ship to such owner.

The Lord Chief Justice, however, directed the jury that they were to take those circumstances into their consideration together with the other facts proved in the case, and so left the case to the jury. The jury having returned a verdict for the plaintiffs below, the defendant below brought a writ of error.

The errors assigned were: that the Chief Justice told the jury, that in considering whether the loss was a total or a partial one, they were not to take into their consideration the circumstance of the ship being valued at 8000*l.* in the policy, although she might have been repaired in six weeks, so as to be quite as good in all respects as before the accident, and quite as fit to prosecute the voyage for which she was insured, for a sum considerably less than 8000*l.*; and that they were to take into their consideration the cost of the repairs on the one hand, and on the other, what would be the intrinsic value of the ship to the owner under all the circumstances attending her after she was repaired;

and that they were to say whether the owner of the ship, being a man of prudence and discretion, and uninsured, would, under all the existing circumstances, have repaired his ship or not; that if a prudent and discreet owner, being uninsured, would have repaired the ship, the plaintiffs below ought to have done so, and the loss in that case was only a partial loss; but if such person would not have repaired his ship, the loss was a total loss; and that, in estimating the value of the ship, and whether the loss was total or partial, the jury were to take into their consideration the circumstances of the plaintiffs below having been domiciled in *Holland*, and the ship being a *Dutch* ship, together with all the other facts proved as aforesaid; and that the jury ought to consider what would have been the value of the ship to such owner: whereas the circumstances of the ship being a *Dutch* ship, and the owners domiciled in *Holland* — and that in *Holland* a vessel, if stranded, was considered incapable of repair, so as to make her as good as before the stranding; though in fact she might be repaired so as to make her quite as good as before the stranding; and that, in *Holland*, a ship if stranded, though afterwards repaired so as to make her quite as good for all purposes of navigation, and of the voyage she was to perform, as she was before and at the time of the stranding, lost her character as a ship, and was reduced to a lower class, — ought not to have been taken into consideration by the jury in forming their opinion of the intrinsic value of the ship, and whether she was or was not worth repairing, nor whether the loss was total or partial.

The case was argued by *Wightman* for the plaintiff in error, and by *W. H. Watson* for the defendants in error.

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newspapers; and that at the same time a notice was inserted in the same newspapers, that a registry was in the course of being made out of all persons entitled to shares in the capital stock of this company; and that it was necessary for holders of scrip-certificates to exchange the same for certificates of shares under the seal of the company; and every holder of scrip-certificates was requested to leave the same at the company's office before the 10th of *September* next, with a memorandum in writing on the back thereof, stating his christian and surname, profession, and residence.

One *E. Ayres*, who was called as a witness, stated that he was the secretary of the company, and had been such secretary from *June* 1838, when he succeeded one *Gilson*; that *Gilson* was the secretary of the company before the passing of the act, and so continued down to the time the witness succeeded him; and that the witness had been in the service of the company as their clerk, and assisted *Gilson* from *November* 1835 until he became secretary; that about the time the above-mentioned advertisements were published, the directors of the company provided a book for the purpose of entering therein and forming a register of the names and additions of parties entitled to shares in the undertaking, with the number of their shares, which was called "The Register Book;" and that previously to the said first general meeting, the names of many persons were entered by *Gilson* in that book as being entitled to shares; that the names so entered were taken from indorsements upon documents called "Scrip-Certificates," as they were from time to time left at the office of the company after the publication of the last-mentioned advertisement; that at the first formation of the company, before the act of parliament was passed, persons desirous of obtaining shares in the undertaking, paid a deposit of 2*l.* per share upon the

number of shares they intended to take, to the bankers appointed for that purpose, from whom they obtained a receipt for such deposit, and on production of that receipt at the office of the company, one of such documents, called a scrip-certificate, was delivered to them.

The witness further proved, that all such scrip-certificates, at the time they were issued by the company, were signed by three of the persons who then acted as directors of the company, and were marked as entered by *Gilson* as secretary; and that the same became saleable, and were commonly sold in the market, immediately they were so issued; that the numbers mentioned in the scrip-certificates, as distinguishing the shares, were in arithmetical order, from one upwards, according as they were issued from time to time, and that scrip-certificates were issued for upwards of 11,000 shares in the whole; that after the act of parliament passed, and after the publication of the last-mentioned advertisement, a great number of scrip-certificates, which had been issued as above-mentioned, were brought to the office of the company already indorsed, or which were at the time they were so brought to the office, there indorsed with the names, professions, or additions and places of abode of persons, for the purpose of their being registered as shareholders; and to each person leaving one of them, a receipt was delivered as follows:

“Memorandum, that the undersigned has received of ——— scrip-certificates, for ——— shares in the *London Grand Junction Railway*, for which certificates of shares under the common seal of the company will be delivered on or after the ——— day of ——— 1836, on receipt of this memorandum” —

Which receipt was signed by the witness, it being a part of his duty so to do, and the blanks appearing therein being respectively filled up with the name indorsed on the scrip-certificate or certificates left with

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the number of scrip certificates and the number of shares mentioned in them, as the case might be, and the dates; that on the 30th of *August* 1836, one of such scrip-certificates, filled up for twenty shares of 50*l.* each, numbered from 11,865 to 11,884, both inclusive, dated the 25th of *November* 1835, was brought to the office of the company by some person not known to the witness, but which was already indorsed, or was at the time of its being so brought, indorsed as follows:—
“*Robert Marriott Freeman, surgeon, Stony Stratford, Buckinghamshire;*”—and for which a receipt, in the above form, signed by the witness, and filled up with that name and number of shares, was delivered to the person bringing it; and such scrip-certificate was produced and read in evidence at the trial, and was signed and marked as entered in the manner above described; it being also proved by another witness that the indorsement upon such scrip-certificate was in the handwriting of the defendant; and that the defendant at the time of the trial resided, and exercised the profession of a surgeon, at *Stony Stratford*, in *Buckinghamshire*, and had done so continuously for upwards of twelve years previously and up to that time; and that no other person of that name and profession resided there.

The witness *Ayres* further proved, that when the scrip-certificates, indorsed as aforesaid, were brought to the office of the company, or as soon after as practicable, entries were made in the register book so provided as aforesaid, of the names, additions, and places of abode indorsed on such scrip-certificates, and of the number of shares specified in each, in all respects corresponding with the contents of each of such scrip-certificates and the indorsements thereon, except only as regards the numbers by which the shares were distinguished; that the numbers distinguishing the shares were entered in the register book in arithmetical order, from one upwards,

as they were registered from time to time; and as many of the scrip-certificates which were issued late, and in which the shares were distinguished by the higher numbers, were left at the office to be registered very early and before those previously issued, the entry in the book varied from the scrip-certificates in this particular, but in no other respect; the number and value of the shares as entered in the register-book, corresponding precisely with the scrip-certificates; that after those entries were made in the book, certificates or tickets were made out with the common seal of the company affixed thereto, specifying the number of shares registered in the name of each person as aforesaid, and were delivered to a great number of those persons who had left scrip-certificates indorsed in the manner before-mentioned; and that four such certificates of five shares each, were made out in the name of *Robert Marriott Freeman*, and the said seal affixed thereto, but were never called for by any one; and being produced by the witness at the trial, they appeared to be all in the following form, and varying in no particular except the numbers distinguishing the shares of each.

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“ *London Grand Junction Railway Company.*

“ Incorporated by act of parliament *July 4th, 1836.*

“ Capital £600,000, in 12,000 shares of £50 each.

“ These are to certify, that *Robert Marriott Freeman*, surgeon, is the proprietor of five shares, No. 2896 to 2900, of the *London Grand Junction Railway Company.*

“ Given, under the common seal of the said company, the 6th day of *October 1836.*

“ No. 1380.

“ Entered, *L. Gilson*, Sec.” (L. s.)

The witness further proved, that shortly after the said scrip-certificate indorsed with the name of *R. M.*

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Freeman was left at the office as aforesaid, and before the said first general meeting of the company, an entry was made in the register book, corresponding with such indorsement and with the said certificate of shares; and that after such entry was made, the witness was present and assisted at such meeting; and that the common seal of the company was then fixed to the book at a part subsequent to such entry, and on one of the pages thereof, immediately below the last entry therein contained at that time.

The register book was produced, and the witness stated, that all the entries therein were in the handwriting of *Gilson*, — that the seal appearing to be thereto affixed in several places, was the common seal of the company, — and that the same was brought from the office of the company by the witness (in whose care it had been ever since he became the secretary of the company), and contained an entry as follows: — “*Robert Marriott Freeman, surgeon, Stony Stratford, Buckinghamshire. Number of shares taken, twenty. Total amount subscribed, 1000*l*. Deposit paid, 40*l*.*” And in the margin of the said book, immediately opposite the said name, and as part of the entry, were specified the numbers by which such shares were therein distinguished, and which were from 2896 to 2915, both inclusive.

The witness further proved, that no addition to the said book, or alteration therein, had been made since the said seal was affixed thereto at the first general meeting as aforesaid, except entries, in the same form, and expressing the same particulars, as to shares subsequently registered, and the said seal being again affixed upon several of the subsequent pages thereof, the last-mentioned entries having been made at parts of the book, both before and after the pages on which the first seal appeared; that the company had also provided another

book for the purpose of entering an account of the places of abode of the proprietors of the said undertaking, and of the several persons entitled to shares therein, which was produced, and contained an entry as follows: "*Robert Marriott Freeman, Stony Stratford, Buckinghamshire,*" that a meeting of the company was duly held on the 28th of *November* 1836, and the directors present thereat passed a resolution that a call of 1*l.* per share should be made upon the subscribers to and proprietors of the said undertaking, to defray the expenses of and carry on the same, which resolution signed by the chairman of the said directors was produced and read in evidence.

That such call was accordingly made and notified by circular letters addressed by *Gilson* the then secretary to the registered proprietors of shares in the said undertaking, and one of such circulars was put in the general post on the 18th of *November* 1836, addressed to the defendant at *Stony Stratford*; and that more than twenty-one days' notice of such call was duly advertised in the *London* newspapers.

The witness further proved, that after the time appointed for the payment of the said call, circular letters calling their early attention thereto, were written and addressed to all the several persons whose names were entered as aforesaid in the register-book as proprietors of shares in the undertaking; and that one of such circulars was put in the general post, addressed to the defendant at *Stony Stratford*.

That neither of the letters written to the defendant was ever returned to the office of the company, or any answer thereto received, and that no payment had been made in respect of the said call upon any of the shares so registered in the name of the defendant as before mentioned, or any sum subscribed in respect thereof, except the deposit of 40*l.* appearing in the above entry.

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The witness *Ayres*, on his cross-examination by the defendant's counsel, proved, that the only mode by which persons became shareholders in the company before the act of parliament passed, was by paying the deposit money to the bankers appointed for that purpose, and obtaining scrip-certificates, or by buying such scrip-certificates in the market of persons who had so previously obtained them; that before the act passed the shares were sold by selling the scrip-certificates, but no entry of any such sale or transfer was made in any book kept by the company, nor was any account kept by the company of any such sale or transfer; and that no entry was made in any book, except of those persons who, having paid the deposit-money at the banker's, brought a receipt for the same, and obtained scrip-certificates; all of whom were required to sign, and signed, and alone signed, the parliamentary contract; that the witness was in attendance at the office of the company during the time the secretary was preparing the register-book, so far as related to the entries therein made up to the time of the first general meeting; and that those entries were made by the secretary from scrip-receipts which were brought to the office, as well by persons who had originally paid deposits into the bankers and signed the parliamentary contract as by others who had not, but were merely holders of the scrip-certificates; and that the entries were so made according to the names indorsed on such certificates, whether those names were the names of original subscribers or of others; and that such register-book was the first book in which any entry was made of scrip-certificates, after they were brought in by those two classes of persons; that an entry of all the scrip-certificates issued by the company was made in the margin of a book called the Scrip Book, and from which the scrip-certificates were cut (and which was referred to by the word "entered" appearing on the certificates), express-

ing the time when the certificates were issued, and the name of the person to whom they were first delivered; that the entries were made in the register-book, according to the order in which the scrip-certificates were brought in, without regard to the numbers mentioned in such certificates; that no names were entered in the register-book before the first general meeting, but those indorsed on scrip-certificates brought in; and that the number of shares ascribed to each name was the number of shares for which the scrip was brought in; and that the shares were allotted according as the scrip-certificates were brought in, in numerical order.

The witness, being referred to the register-book, stated, as the fact was, that it appeared thereby that the shares from No. 905 to 1000 had never yet been allotted; and that a blank space still appeared therein opposite those and the intervening numbers, the shares from 1001 and upwards being allotted to the persons whose names were registered.

The witness further proved, that the certificates made out under the seal of the company for delivery to the persons registered as shareholders from time to time, were so made out that some of them were for one share each, and others for five shares each; and that the first thousand shares numbered from 1 up to 1000 were reserved in order that the certificates issued for them might each be made out for one share only, for the accommodation of those proprietors who wished to have their certificates for one share instead of five shares each; and also for the purpose of making up the numbers in cases where persons were entitled to a number of shares, not divisible by five; that the said blank was occasioned by the whole of the shares so reserved and numbered in the book, from 1 to 1000 not having been yet allotted, and the shares commencing with No. 1001 upwards, having been allotted in certificates for five

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shares each to persons whose names appeared in the book; that when proprietors brought in their scrip-certificates and wanted sealed certificates for one share each, shares numbered below 1000 were allotted to them, and their names were entered in the register-book in a regular series in a blank space opposite the numbers below 1000 which remained unappropriated at the time; that this was done in some instances after the common seal had been affixed to some subsequent parts of the book; and that as far as related to those shares numbered below 1000, the witness could not distinguish between the entries made before the common seal was affixed, and the entries made after the common seal was affixed to some one of the subsequent parts of the book in which it was affixed; that scrip-certificates for between 11,000 and 12,000 shares were issued before the first general meeting; that persons who had paid deposits on shares to the bankers, and signed the parliamentary contract, were not registered as proprietors, unless they brought in the scrip-certificates; and that a great number of shares on which deposits were paid, and for which the scrip-certificates were given, had not been brought in at the time of the first general meeting; that the register-book contained a column for entering the amount of the calls paid on the shares registered, but that entries were not made therein of all the persons who had paid the first call, and that it could not be ascertained thereby how many had paid the call, and how many had not; that applications for payment of the calls were made to those only who were registered as shareholders in the register-book (though it was paid by others also), and not to original proprietors who had not brought in their scrip-certificates; that above 300 new shares were sold by the company after the passing of the act of parliament, but the witness was unable to tell what proportion of the shares registered after the first general

meeting, or between the periods at which the common seal of the company was subsequently affixed to the register-book consisted of new shares, and what of original shares for which scrip-certificates had been given; that 7725 was the number distinguishing the last share registered at the time the seal was first affixed; the last share registered when it was affixed the second time, which was on the 27th of *February* 1837, was 8910, and the last registered prior to the seal being affixed the last time, which was in *February* 1818, was 9450; that there was no minute or memorandum made to distinguish the circulars sent by the witness from those sent by the secretary, and no book was kept in which they were entered; that they were sent to persons registered as shareholders only, and not to original shareholders; that no inquiry was made when persons brought scrip-certificates, who had not been original subscribers, into their responsibility, or how they had become possessed of the certificates; that no account was taken by the company, or their servants, of transfers of scrip-certificates from original subscribers, to persons becoming holders of them before they were brought in to be registered; that they might pass through many hands before they came to the office to be registered; that whoever brought one to the office and put his name, profession, and address on the back was registered as proprietor of the number of shares therein specified, unless notice was received from some other person to the contrary; that since the passing of the act of parliament the shares registered were transferred by deed which was left in the office, and then the transfer was made accordingly in the books; that a Mr. *White* paid the deposit on the shares above mentioned, as numbered from 11,865 to 11,884, and was the original subscriber who signed the parliamentary contract in respect thereof; that his address was known to the secretary and clerk of the

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company at the time when the scrip-certificate for those shares was left for registration as before mentioned; and that they had no note, memorial, memorandum, or transfer of, or authority from him to transfer those shares to any one.

The witness *Ayres*, on his re-examination, proved, that all the names and entries contained in the register-book as they appeared therein up to that part where the common seal of the company was affixed thereto for the last time, were so entered and made before the seal was so affixed, and that no names had been entered therein since the last seal was affixed, excepting only that some entry might have been since made as to shares numbered between 1 and 1000, in the blank left for that purpose, in cases where parties might have brought scrip-certificates for a number of shares not exactly divisible by five; that such seal was so affixed at the last general half-yearly meeting of the company held on the 28th of *February* 1838, at which time the register-book was in the same state, with the above exception, as when produced at the trial; that the whole entry made in the same book as to the shares therein allotted to the name of *Robert Marriott Freeman* was so made, as it appeared at the trial, before the common seal was affixed to the book for the first time; that the call of 1*l.* per share was made, generally, on all the proprietors as above mentioned; and that some of those who held scrip-certificates which had not been registered paid the call after it was made to the bankers of the company.

For the plaintiffs it was insisted, that the several matters so produced and given in evidence on their part as aforesaid, were sufficient, and ought to be admitted and allowed as sufficient evidence, unless explained or answered by evidence on the part of the defendant, to entitle the plaintiffs to a verdict.

No evidence was offered on the part of the defendant; but it was insisted that the said several matters did not

require any explanation or answer by evidence, and were not sufficient, and ought not to be admitted or allowed to entitle the plaintiffs to a verdict, and that, upon the evidence so given, the defendant was entitled to a verdict.

The learned judge told the jury that, in his opinion, the evidence given on the part of the plaintiffs was not sufficient to entitle them to a verdict on either of the issues; that there was no evidence of the defendant being a proprietor of the said shares in the undertaking in the declaration mentioned; that the register book which had been produced was not made up in a way conformable to the act of parliament; that the act of parliament required that the parties who were *original* proprietors of shares should be, in the first instance, entered as the proprietors, and then that the shares should be transferred according to the provision in the said act contained as to the transfer of shares; that the only persons the company were entitled to enter in the said book were the parties who were *original* proprietors of shares, or their personal representatives, or persons entitled by transfer under the act, and that a person who produced a scrip-certificate was not entitled to be entered a proprietor in virtue of such certificate merely.

The jury having returned a verdict for the defendant, the counsel for the plaintiffs tendered a bill of exceptions.

The exceptions were argued on the 7th and 9th December 1840, before Lord Denman C. J., Littledale J., Patteson J., Williams J., Parke B., Alderson B., and Rolfe B.

Talfourd Serjt. (Swann was with him) for the plaintiffs. Two questions arise upon this bill of exceptions; first, whether the proof given on the part of the plaintiffs was sufficient *prima facie* evidence to shew that the

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defendant, at the time the call was made and the action brought, was a proprietor of shares in the company; and, if so, secondly, whether such *prima facie* evidence was rebutted by the facts which appeared on the cross-examination of the witness Ayres. By the 145th section.(a) of the act, the company are to cause the names and additions of parties who are or shall become entitled to shares in the undertaking, with the number of shares they are entitled to, and the amount of subscriptions paid thereon, and the number of every share, to be entered in a book, and after such entry to affix their common seal thereto. The 147th section directs, "that the company shall in some proper book, to be provided by the said company for that purpose, enter and keep a true account of the *places of abode* of the several proprietors of the said undertaking, and of the several persons and corporations who shall from time to time become proprietors thereof, or be entitled to any share therein." By the 152d section (b), in any action brought against any proprietor of any share, to recover money due in respect of any call, in order to prove that the defendant was a proprietor of such share at the time of making the call, "the production of the book in which the said company is by this act directed to enter and keep the *names and additions of the several proprietors* from time to time of shares in the said undertaking, with the number of shares they are respectively entitled to, and of the *places of abode* of the several proprietors of the said undertaking, and of the several persons and corporations who shall from time to time become proprietors thereof, or be entitled to shares therein, shall be *prima facie* evidence that such defendant is a proprietor, and of the number and amount of his shares therein." One of the questions for the

(a) See *post* p. 645.

(b) See the clause more at length, *post*, p. 634.

court to decide is, whether the register book of the company given in evidence at the trial, and made *prima facie* evidence by the above clause, is to be rejected on account of some omission or informality. In *The Southampton Dock Company v. Richards (a)*, where a clause in the *Southampton Dock Act* directed the company to cause the names, additions, and places of abode of the several persons entitled to shares in the undertaking, with the number of shares which they were entitled to hold, and the amount of subscriptions paid thereon, and the number by which each share should be distinguished, to be entered in a book to be kept by the secretary of the company, which book was made *prima facie* evidence in an action for calls; it was held to be no objection to the admissibility of the book produced to prove the defendant a proprietor, that an irregularity or omission was shewn to exist with respect to the entries in the book relating to other shareholders, the provisions as to the entries to be made in the book being directory only, and not essential. That case is a direct authority for the plaintiffs. Besides the evidence of the register book, the plaintiffs proved that a scrip-certificate, filled up for twenty shares of 50*l.* each; was brought to the company's office to be registered, with an indorsement of the defendant's name, addition, and place of abode, in his own handwriting.

It is submitted, that the *prima facie* evidence given by the book was not rebutted by its being elicited on the cross-examination of *Ayres*, that one *White* was the original proprietor of the shares in question, and that, since the passing of the act, the shares registered have been transferred by deed, pursuant to the 155th section of the act. This will depend, in some degree, upon the construction to be put upon the first,

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probable expense of making the said railway and the other works hereby authorised, will amount to the sum of 600,000*l.*, and the sum of 350,000*l.*, or more than one half thereof, has been *already subscribed for* by several persons, under a contract binding themselves, their heirs, executors, administrators, and assigns, for the payment of the several sums by them respectively subscribed for," enacts "that the whole of the said sum of 600,000*l.* shall be subscribed for in like manner before any of the powers given by this act in relation to the compulsory taking of land for the purposes of the said railway, shall be put in force." [*Patteson J.* I cannot reconcile these three clauses.]

There is nothing illegal in shares, in undertakings like the present, being handed over from one party to another previous to the companies obtaining their acts of incorporation; for such companies are only extensive partnerships. In *Josephs v. Pebrer* (a) the court of King's Bench, in deciding that the "Equitable Loan Bank Company," was illegal within the provisions of the 6 G. 1. c. 18. s. 18, 19., seem to have been in some degree influenced by the circumstance that the company had been formed for the purpose of lending money at an uniawful rate of interest. The last-mentioned statute having been repealed by the 6 G. 4. c. 91., the question is, whether undertakings like the present are illegal at common law. *Duvergier v. Fellowes* (b) and *Blundell v. Winsor* (c) are both clearly distinguishable from the present case. In the former it was distinctly admitted on the pleadings, that it was intended that the company should act as a corporation; and in the latter the deed establishing the company held out to the public a false and fraudulent representation that the

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(a) 3 B. & C. 639. ; 5 D. &
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(b) 5 Bingh. 248. ; 2 M. &
P. 384.

(c) 8 Simons, 601.

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shares could be transferred without any restriction or control whatsoever. In *Walburn v. Ingilby* (a), Lord *Brougham* expresses a strong opinion that an association like the present is not illegal. In *Fox v. Clifton* (b) where the question was, whether certain parties had held themselves out to the world as partners in an unincorporated company; the court of Common Pleas appear to have considered the undertaking as perfectly legal. So also in *Harvey v. Kay* (c) and *Lawter v. Kershaw* (d), the legality of such associations seems to have been assumed. Here the defendant, after having by his own act in transmitting the scrip-certificate to the company's office, indorsed by himself, in order that he might be registered as a proprietor, admitted himself to be a partner in the undertaking, cannot escape from the liabilities which that character attaches to him. There was, at all events, evidence to go to the jury, from which they should have been allowed to draw their own conclusion.

Byles for the defendant. It is submitted that *White*, the original proprietor of the shares in question, neither did nor could transfer them before the passing of the act, and it is clear upon the evidence that he did not assign them after the act was obtained. Even admitting that the evidence established a *prima facie* of proprietorship against the defendant, it was rebutted by the facts disclosed on the cross-examination of *Ayres*. It appeared on such cross-examination that *White* paid the deposit on the shares, and was the original subscriber who signed the parliamentary contract in respect thereof, and that no transfer had been made of them. *White*, at the time that the act passed, had an interest in such

(a) 1 *Myne & K.* 61.(c) 9 *B. & C.* 356.(b) 6 *Bingh.* 776. ; 9 *Bingh.* 115. ; 2 *M. & Sc.* 146.(d) *M. & M.* 93.

contract, with reference to which he had also incurred a liability from which he could only discharge himself in the manner prescribed by the 155th section of the act, namely, by an assignment under deed. His interest would not pass by delivery, being at most, a chose in action, not transferrable at law, and, it is submitted, not assignable in equity, notwithstanding the repeal of the 6 G. 1. c. 18. The 6 G. 4. in repealing that statute, leaves the undertakings and matters against which that act had been directed to be "adjudged and dealt with in like manner as the same might have been adjudged and dealt with at the common law." In *Josephs v. Pebrer*, Lord Tenterden throws out a doubt, whether trafficking in these shares may not be illegal at common law, inasmuch as it is "bargaining and wagering about an act of parliament to be obtained in future." In *Duvergier v. Fellowes*, Best C. J. says, "There can be no transferrable shares of any stock, except the stock of corporations, or of joint-stock companies created by act of parliament." And in *Blundell v. Winsor*, the Vice-Chancellor, in deciding the deed for the formation of the company to be illegal, did so on the ground that it improperly held out to the public that the shareholders were to have the power of transferring their shares, so as to get rid of all their liabilities, which could not be done. In *Fox v. Clifton*, *Harvey v. Kay*, and *Lawler v. Kershaw*, the question arose between strangers and parties who either had been or had held themselves out to the world as partners in the undertakings. It is argued that the first and third sections of the act seem to contemplate that parties might assign their shares before the act passed, but that this could not be done is evident from the 223d section, which speaks of the parliamentary contract as a continuing obligation. The only two clauses in the act having reference to the transfer

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of shares are the 148th and 155th. The former clause relates to the transfer of shares in consequence of death, marriage, &c., "by any other legal means than by a transfer or conveyance thereof duly made and executed as herein directed," in which case an affidavit or affirmation is to be made as therein specified, as to the manner in which shares have passed to other parties, and on such affidavit or affirmation being transmitted to the company, the latter are to register the new proprietors. It is said, that the defendant should have shewn that he did not acquire his shares by any of the modes mentioned in that section. If this was necessary, it sufficiently appeared in the cross-examination of *Ayres*, that the company had no such affidavit or affirmation as is required by the above section, and consequently, that the defendant had not become possessed of his shares by the means referred to in that clause. By the 155th section, proprietors of shares are authorized to sell their shares, which would have been an unnecessary provision if the right of sale had existed independently of the act. The clause, after conferring such power, and prescribing that the form of conveyance is to be by deed under seal, and that the deed is to be kept by the company, who are to enter a memorial of such sale and transfer in a book, and to indorse the entry of such memorial on the deed, and on demand to make an indorsement of such transfer "on the back of the certificate of each share so sold," and deliver the same to the purchaser for his security, which indorsement is to be considered in every respect as a new certificate enacts, "and until such memorial shall have made and entered as before directed, *the seiler thereof shall remain and be held liable for all future calls*, and the purchaser shall have no part or share of the profits of the said undertaking, nor any interest in respect of such share paid to him, nor any vote in

respect thereof as a proprietor of the said undertaking." As the company has no memorial of any transfer, *White*, and not the defendant, is the party liable for future calls. [Lord *Denman* C. J. Unless it can be shewn that the book was not evidence at all, the ruling of the learned judge cannot be supported.] Even if the learned judge had declined to receive the book, it would have been immaterial; for where evidence has been improperly rejected, the courts will not grant a new trial, when, had such evidence been admitted, a verdict for the party by whom it is tendered would be clearly against the weight of the whole testimony in the cause; *Crease v. Barrett* (a), *Baron de Rittzen v. Farr*. (b)

The evidence given by the plaintiffs, to shew the proprietorship of the defendant did not establish even a *prima facie* case. With respect to the alleged act of the defendant, it was not shewn that the scrip-certificate with the indorsement thereon, in the defendant's handwriting, was sent to the office by him, or by his authority. Neither was there any thing beyond conjecture to indicate the purpose for which the indorsement was made. Even admitting that the defendant himself carried the scrip-certificate to the company's office, in order to become a member of the company, the latter should have complied with his desire by making him the legal assignee of *White's* interest. According to the provisions of the act of parliament, they ought first of all to have registered *White* as the proprietor of the shares, and on the production of the deed of transfer required by the 155th section, have caused a memorial of the transfer to have been entered in the transfer book. Not having taken this course, they can now attempt to fix the defendant as the proprietor of the shares.

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(a) 5 *Tyrwh.* 458.; 1 *C.M.*
& *R.* 919.

(b) 4 *A. & E.* 53.; 5 *N. &*
M. 617.

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As to the register-book, which by the 152d clause is made *prima facie* evidence, the question is, whether the 145th section, which requires the company to keep such book is to be strictly or liberally construed. Lord *Tenterden*, in *The Stourbridge Canal Company v. Wheelcy* (a), says, "This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute, and the rule of construction in all such cases is now fully established to be this, that any ambiguity in the terms of the contract must operate against the adventurers, and in favour of the public, and the plaintiffs can claim nothing which is not clearly given to them by the act. This rule is laid down in distinct terms by the court in the case of *The Hull Dock Company v. La Marche* (b) where some previous authorities are cited, and it was also acted upon in the case of *The Leeds and Liverpool Canal Company v. Hustler*" (c). Although all of the requisitions contained in the 145th section, may not be in the nature of conditions precedent, but as to some may be directory only, the book must be substantially kept as directed by the act. Here the book is defective in three important particulars: first, the shareholders who neglected to bring in their scrip-certificates are entirely omitted; secondly, parties standing in the position of the defendant were improperly entered; and, thirdly, after the common seal had been affixed to the book it was altered so as to affect its validity as against the defendant. *The Southampton Dock Company v. Richards* (d) is clearly as distinguishable from the present case. There the defendants had subscribed the parliamentary contract, and the defects in the book were of

(a) 2 B. & Ad. 792.

(b) 8 B. & C. 51.; 2 M. & R. 107.

(c) 1 B. & C. 424.; 2 D. & R. 556.

(d) *Ante*, Vol. I. 448.; 1 Scott's N. R. 219.

a trifling nature, and the court considered that the book substantially complied with the provisions of the act. In *Hare v. Waring* (a), the court of Exchequer held the transfer book to be no evidence of the title of the shareholder; and also that the certificates were insufficient from not having an indorsement of transfer. [Parke B. The question there was between third parties; and it is only in favour of the company that the book is made *prima facie* evidence.] By the 145th section, the entries in the book are to be made before the seal is affixed, but it appears from the cross-examination of *Ayres*, that entries had been made in a blank left for that purpose after the seal had been affixed to subsequent parts of the book. [Alderson J. The first seal would not verify entries subsequently made, but the last seal would verify all entries made up to that time.]

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Swann (in the absence of *Talfourd* Serjt.), in reply. The defendant by sending in the scrip-certificate pursuant to the advertisement of the company, and thus representing himself as the proprietor of the shares specified in such certificate, is estopped from disputing his liability. *White*, after having parted with his shares to the defendant, could not have called upon the company to register him as the proprietor. Even supposing *White* to remain responsible in respect of the shares, it does not necessarily follow that the defendant may not also be liable. It was clearly the intention of the legislature that the scrip-certificates might be transferred from hand to hand in like manner as foreign bonds. In *Kempson v. Saunders* (b) it seems to have been considered that shares in an undertaking intended to be sanctioned by an act of parliament, might be handed

(a) 3 M. & W. 362.

(b) 4 Bingham 5.; 12 Moore, 44.

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over without objection. This case is not to be distinguished from *The Southampton Dock Company v. Richards*.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the court. This was an action for calls. The first plea was, never indebted ; the second, that the defendant was not a proprietor ; on both of which issue was taken.

The evidence was, that at the first general meeting in *September* 1836, within six months after the passing of the act, due notice of an intended registry was given, and that holders of scrip-certificates should exchange them for share certificates under the company's seal, at the office, before the 10th of *September*. The company provided a register-book, and before the general meeting, many names were inscribed therein from indorsements on scrip-certificates left at the office. Before the act, persons desirous of obtaining shares, paid a deposit of 2*l.* per share to the bankers of the company, and producing the receipt at the office obtained scrip-certificates, upon which was the following memorandum : " The holder of the above shares having signed the parliamentary engagement, and agreed to pay calls, is the proprietor," &c. These scrip-certificates were signed by the directors, and marked " entered " by the secretary, and were sold in the market. After the advertisement, these scrip-certificates were brought to the office, indorsed with the names and additions of the holders, who received instead an undertaking to supply certificates of shares on receipt of the memorandum. On the 30th of *August* 1836, scrip-certificates, dated *November* 1835, indorsed by the defendant with his name and addition were brought to the office, and receipts were given to the bearer. These were immediately entered in the register, not according to the numbers

appearing on the certificates, but according to the time of their being entered. A sealed ticket was then made out conformable to this entry, and describing the defendant as proprietor of ——— shares, but they were never called for by him. After the defendant had brought in his certificates, the seal was affixed to the register-book, which was produced in evidence, kept by the secretary. It contained a full entry of those shares. The shares in the book were numbered 2896 to 2913, but the scrip-certificates were numbered 11,865, and twenty numbers from that to 11,884. There also was another book of the names and places of abode of the shareholders, containing the name and place of abode of the defendant. The first 1000 shares in the register-book were all originally left in blank for the convenience of those who might bring fewer than five certificates, beyond that number the entries were made according to the order in which the scrip-certificates were brought there, without reference to the number of the scrip-certificates. Many scrip-certificates had not been brought in. Entries had not always been made of who had paid the calls. A *Mr. White* was the original proprietor for these shares: his address was known at the office. No call was made on him, and there was no note or memorial of any transfer from him to the defendant.

The learned judge before whom the cause was tried, told the jury that there was no evidence to entitle the plaintiff to a verdict; that the book was not kept conformable to the act; that the names of none should have been entered in it but original proprietors of shares, or their personal representatives, or those to whom these had conveyed in the manner provided by the act, and that a holder of scrip-certificates was not thereby entitled to be entered.

The jury accordingly returned a verdict for the de-

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fendant, and a bill of exceptions was tendered to his direction.

The question has been fully argued before us, and depends on the construction to be put on the provisions of the company's act, which describes the work contemplated, and enacts (s. 1.) "that certain persons named, and every other person or corporation that has subscribed, or shall hereafter subscribe towards the said undertaking, and their several and respective executors, administrators, and assigns, shall be, and they are thereby united into a company for making and maintaining the projected rail-road." The third section gives the company power to raise among themselves 600,000*l.* for making and maintaining the rail-road and works, the whole to be divided into shares of 50*l.* each, which shall be numbered from No. 1., and distinguished by the numbers to be applied to the same; and the said shares are *vested in the several parties taking the same, and their several and respective successors, executors, administrators, and assigns, proportionably to the sum they shall severally contribute, and every person and corporation, and their several and respective successors, executors, administrators, and assigns who have subscribed, or who shall severally subscribe for one or more share or shares, or such sum or sums as shall be demanded in lieu thereof towards the said undertaking, shall be entitled to a proportionable part of the profits of the concern.*

Sect. 122. gives the right of voting at general meetings to "every person and corporation who shall have duly subscribed for or have become entitled to any share." It is enacted by sect. 145., that the company *shall*, at their first or some subsequent general meeting, cause "the names of the several corporations, and the names and additions of the several persons who shall thereby, or who shall from time to time thereafter, become

entitled to share in the said undertaking, with the number of shares they are respectively entitled to, and the amount of subscriptions paid thereon; and also the proper number by which every share shall be distinguished, to be fairly and distinctly entered in a book to be kept by the company, and after such entry made, to cause their common seal to be affixed thereto; and the said company shall, from time to time, cause a certificate or ticket with the common seal of the said company affixed thereto, to be delivered to every such proprietor on demand, specifying the share or shares to which he is entitled."

The company is also required, by the 147th section, to keep a book of the places of abode of the several proprietors. By the 148th, provision is made for ascertaining who the proprietors are, in case of any dispute, nearly in these words: "that in all cases where the right of property in any share in the said undertaking shall pass from any proprietor thereof to any other person, by any other legal means than a transfer or conveyance thereof duly made and executed as herein directed, a declaration shall be made in writing, stating the manner in which such share shall have been passed to such other person; and such affidavit or affirmation shall be transmitted to the company, who shall enter the new proprietor's name in their book, and before such declaration shall have been transmitted and such entry made, no person to whom such shares shall have passed shall be entitled to partake of the profits or enjoy any of the privileges of a proprietor," — with particular provisions in reference to the cases of female proprietors marrying, and the death of any proprietor.

The sections which regulate calls on shares are the 149th, and some which follow it. The persons required to pay them are "the several parties who subscribed, or who shall thereafter subscribe for or towards the said

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undertaking, and they are hereby required to pay the sums of money by them respectively subscribed for or towards (probably omitting by mistake, "the said undertaking," or) such parts or proportions thereof as shall from time to time be called for by the directors," &c. Then, after imposing some limitation in point of time, and amount and notice, it says, "the respective owners of shares shall pay their rateable proportions of the monies to be called for as aforesaid," &c. And if any owner or proprietor for the time being of any such share shall neglect so to do, the company may declare the share of such owner to be forfeited, &c.

The 152d section prescribes the manner in which the company may sue for calls, and is that upon which the present action is founded. "In any action to be brought by the said company against any proprietor, for the time being, of any share in the said undertaking, to recover any money due and payable for or in respect of any call, it shall be sufficient for the said company to declare and allege that the defendant, being a proprietor of a share in the said undertaking, is indebted to the said company — in such sum of money as the calls in arrear shall amount to — for a call or so many calls of such sums of money upon a share belonging to the said defendant; whereby an action hath accrued to the said company by virtue of of this act, without setting forth the special matter; and on the trial of such action, it shall only be necessary to prove that the defendant, at the time of making such respective calls, was a proprietor of a share in the said undertaking, and that such call was in fact made, and that such notice was given as is directed by this act, without proving the appointment of the directors who made such calls, or any other matter whatsoever; and the said company shall thereupon be entitled to recover what shall appear due, including interest computed as aforesaid on such calls, unless it shall appear that any such

call exceeded 5% per share, or was made payable before the expiration of two calendar months from the day appointed, for payment of the last preceding call, or that notice was not given as herein-before required. And in order to prove that the defendant was a proprietor of such share in the said undertaking as alleged, the production of the book in which the company is by this act directed to enter and keep the names and additions of the several proprietors from time to time of shares in the said undertaking, with the number of shares they are respectively entitled to, and of the places of abode of the several proprietors of the said undertaking, and of the several persons and corporations *who shall from time to time become proprietors thereof, or be entitled to shares therein*, shall be *prima facie* evidence that such defendant is a proprietor, and of the number and amount of his shares therein."

The form of transfer is given in sect. 155. It is to be by a deed which the company are to keep and enter a memorial of it in some book, indorsing the memorial with the entry, and until such memorial is entered, the seller shall be held liable for future calls, and the purchaser shall have no share in the undertaking, no share in the profits, and no vote at the meetings. The 223d section, which prohibits the company from taking land compulsorily before the whole sum of 600,000*l.* shall have been subscribed for, was also referred to as throwing light on the argument, inasmuch as it recites that, at the time of the act passing, 340,000*l.* had been already subscribed for.

Applying the facts proved to these enactments, the learned counsel for the defendant (who was also defendant in error) argued; first, that the register book produced was not evidence, because it was kept in a manner by no means conformable to the act; secondly, that, if

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it was admissible in evidence, the *primâ facie* case of ownership which it made out had been conclusively rebutted by the other facts proved.

As to the first of these propositions, it is to be observed, that the book which, by the 152d section, is made *primâ facie* evidence, is "the book in which the company is by the act directed to enter and keep the names and additions of the several proprietors, with the number of shares and their places of abode," &c. &c. By section 145. the company is directed to keep a book in which they are to enter (*inter alia*) the names and additions of the shareholders, with the number of shares they respectively hold; but they are not directed to enter their places of abode. By section 147. they are directed to keep another book, in which they are to enter the places of abode of the several proprietors from time to time. It thus appears that the act requires two books to be kept, one containing (*inter alia*) the names and additions of the proprietors, with the number of shares they are respectively entitled to; the other containing only the true account of the places of abode of the proprietors.

To what book, then, does the 152d section refer when it speaks of the book directed to be kept containing the *names, additions, number of shares, and places of abode*? We think it refers to the book in section 145.

It is essential for the purposes of the action for calls that the names and numbers of shares shall be shewn in evidence; that appears from the book in section 145., and not from that in section 147. The places of abode can very rarely, if ever, be important in such actions. One of these two books must have been intended. And, as section 145. is clearly sufficient to shew what is wanted to be shewn, and the other is not, we think that the words of section 152., as to the places of abode, must be re-

jected, as being in the nature of a false demonstration
quæ non nocet.

If, then, the book referred to in section 145. be the book which by section 152. is made *primâ facie* evidence, the next inquiry is, whether the book which was, in fact, produced, was kept pursuant to the 145th section. Now the evidence clearly shews that it was the book intended to be kept under the provisions of that section. It contains the names and additions of all the persons whom the company supposed to be the persons entitled to shares, with the number of those shares, though not in all cases the amount of subscriptions paid thereon, and also the proper number by which each share was distinguished ; and the common seal was from time to time affixed as required by the section.

This appears to us, on principle as well as on the authority of the *Southampton Dock Company v. Richards (a)*, to be a sufficient compliance with the act as to render the book admissible.

It was argued that the book produced contained the names of many persons not entitled, and omitted the names of whole classes who were entitled, and therefore ought not to be received. But if the book is only made admissible in evidence when the company can shew that the persons whose names were entered therein were the persons actually entitled to be so entered, then the provision in the 152d section making the book admissible would be almost nugatory. For these reasons we think the book was *primâ facie* evidence. The allegation that the book had been improperly kept by reason of the possible omission of the seal to some of the later entries in the first 1000 numbers appears to us quite immaterial. Supposing that to be as suggested,

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(a) *Ante*, Vol. I. 448.; 1 *Scott's New Rep.* 219.

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it only shews that as to some entries (certainly not to any of those in question) the book was not perfect. It does not tend to shew it erroneous ; and, even if it did, we do not think it would prevent its admissibility, provided it is a book kept *bonâ fide* with the intention of doing what the act directs ; and, in essentials, complying with its directions. The provisions of the act, as to all the details to be included in the book, are clearly, to a great extent, merely directory.

Supposing, then, the book to be admissible in evidence to shew a *primâ facie* case, then arises the second question, do the facts conclusively rebut this *primâ facie* evidence ? We think they do not.

The argument was, that no others than the original subscribers, or those to whom they might have made over their shares since the passing of the act by the means thereby prescribed, ought to have been registered ; whereas many, including the defendant, were registered, who had, before the act, made purchases of their shares from the original subscribers, receiving scrip-certificates from them in respect of their purchases, and bringing those scrip-certificates to the secretary as vouchers for their ownership. The transfers thus made were said to be altogether illegal, according to the doctrine laid down by Lord *Tenterden* in *Josephs v. Pebrer* (a), and to the cases of *Duvergier v. Fellowes* (b) and *Blundell v. Winsor*. (c) We may observe that that doctrine was not necessary for the decision of the first-mentioned case when before the court, nor will it be necessary for us now to investigate its soundness on general principles, or decide on the extent of its application, if it shall turn out that parliament, in the act for forming this company, has, in fact, given its sanction to the transfer of

(a) 3 B. & C. 639. ; 5 D. & R. 542. ; 1 C. & P. 341. 507. (b) 5 Bingham. 248. ; 2 M. & P. 384. (c) 8 Simons, 601.

shares which had actually taken place at that time. The other two cases fall extremely short of *Josephs v. Pebrer*.

In this case the evidence proved that the original subscribers who had paid their deposits obtained the bankers' receipt for their money; that those persons producing their receipts at the office might maintain scrip-certificates in exchange for them; and that such certificates were commonly sold in the market to the amount of many thousands.

While this course of dealing notoriously prevailed, the company obtained their act, with its recital that a very large sum had been already subscribed for. We cannot suppose parliament to have been ignorant of the manner in which the subscriptions had been made, and the transfer of shares negotiated; and if the intention was to allow none to be proprietors but such as had been originally subscribers, it could not have failed to appear distinctly. Instead of this, the various clauses already quoted shew the most lax employment of all the phrases by which property in the undertaking could be described, out of the most popular vocabulary. These expressions are not designedly varied according to the matter of the respective clauses, but arbitrarily and indiscriminately used as all bearing the same import. The clause 149. fixes liability on those who have subscribed, or who shall hereafter subscribe. Now it is clear that purchasers of shares in the statutable form were intended to pay the calls; but it is equally clear that such purchasers do not *subscribe* in the strict sense of the word. The calls are to be made on *proprietors*; the proprietorship is to be proved by production of the book; and the book is to contain the names of all who are and who shall from time to time be entitled to shares.

Taking all these things into consideration, the court cannot doubt that all are made liable to pay calls, who

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having, before the passing of the act, become entitled by the then well-understood method of transfer, were afterwards registered as shareholders.

There is no principle of law preventing the company, when they came to make up the register-book, from treating the then holders of scrip-certificates applying for shares, as the parties really contributing towards the 600,000*l.*, which the company were, by section 3., authorised to raise. It was the manifest intention of the original subscriber that the holder of his scrip-certificate should be treated as his assignee, and be registered accordingly as a shareholder. And we see nothing in the provisions of the act, or in any general principles of law, to prevent this intention from being carried into effect.

We do not, therefore, find it necessary to rely on the suggestion—that this defendant may have become a proprietor by bankruptcy, or other legal means, before the making up of the books. We decide this case on the broad ground—that the book was, for the reasons we have stated, admissible as *prima facie* evidence that the defendant was a shareholder; and that such *prima facie* evidence was not rebutted by shewing that *White*, and not the defendant, was the original subscriber in respect of the shares in question.

Other incidental points arising in the course of the argument were observed upon and disposed of by the court.

Judgment for the plaintiffs. (a)

(a) *Vide antè*, 238.

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END OF HILARY VACATION.

CASES.

ARGUED AND DETERMINED

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IN THE

COURT OF COMMON PLEAS,

IN

Easter Term,

IN THE

FOURTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in banc during this term were,

TINDAL C. J.

COLTMAN J.

BOSANQUET J.

ERSKINE J.

HENRY PRICE (suing by GEORGE PRICE his April 15.
Guardian) v. JAMES EDWARD DUGGAN.

DEBT, upon an indenture of apprenticeship for four years, whereby the defendant covenanted to pay the plaintiff 20s. per month for the first year, 25s. per month for the second year, and 30s. per month for the third and fourth years. The declaration stated that the plaintiff had served the four years; yet the defendant had not paid the sums of money so covenanted to be paid; whereby an action accrued for 66*l.* 5*s.*

Plea: as to all the sums of money mentioned in the de-

| by which the title to property would be bound. *Semble.*

The court will grant a rule nisi for a new trial after the four days, where the motion has been delayed through mistake and the case is one of importance, or one

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claration, except 23*l.* parcel &c., *actio. non*, because the defendant, after he became indebted, paid to the plaintiff, and the plaintiff accepted and received from the defendant, divers sums of money amounting to the several sums mentioned in the declaration, except as aforesaid, in full satisfaction and discharge of the several sums of money mentioned in the declaration, except as aforesaid, and of all damages, &c. Verification, and prayer of judgment. And as to the sum of 23*l.* parcel &c., *actio. ulterius non*, because the defendant now brings into court the sum of 23*l.* ready to be paid to the plaintiff; and the defendant further saith that he never was indebted to the plaintiff in a greater amount than the said sum of 23*l.* in respect of the cause of action in the introductory part of this plea mentioned. Verification (*a*), and prayer of judgment.

The replication took issue upon the payment and acceptance in satisfaction, and alleged that the plaintiff accepted the 23*l.*, which he took out of court, with a prayer of judgment for his costs and charges. (*b*)

A verdict having been found for the defendant at the trial before *Coltman J.* at the second sittings at *Westminster*, in last *Hilary* term,

Andrews Serjt. now moved for a new trial. According to the ordinary rule, this application ought to have been made in last term, the cause having been tried before the last four days of that term; but under the

(*a*) The verification appears not to be necessary. No witnesses would be required to prove the fact that the defendant brought the 23*l.* into court, or to make out the negative proposition, that he was not further indebted. And see *antè*, Vol. I. 288. *n.*, 754. *n.*, 759.

(*b*) Damages ought, it would seem, to have been prayed also in respect of the detention of the 23*l.*, to entitle the plaintiff to judgment for the costs, which, by the statute of *Gloucester*, are given only where damages are recovered. *Vide Hulleck on Costs*, 2d ed. 2, 3.

special circumstances of this case, it is hoped that the court will think that the motion may be now made. The affidavit of the plaintiff's attorney states, that he understood that the motion could not be made without an affidavit specifying the grounds upon which the plaintiff conceived that he was entitled to the rule; that such an affidavit had been prepared, but that the party by whom it was to be made had in the mean time gone to sea; that the counsel for the plaintiff had written a note to the plaintiff's attorney, suggesting the propriety of making the motion, but the attorney having changed his residence, the note did not reach him till the term had expired.

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TINDAL C. J. If the question between these parties had been a question of importance, or if the verdict would have bound the title to property (a), the court would have been disposed to look more favourably to such an application. I do not think that this is a case in which the practice should be relaxed.

The rest of the court concurred.

Rule refused.

(a) At common law a plaintiff or a defendant, after failing in one species of action, brought to contest a right to property, had, in general, the opportunity of trying his right again in an action of a higher nature. This appears to be the ground on which parties, who had several defences to an action, or who had several answers to a defence, were precluded from availing themselves of more than one

plea or replication. Thus Lord Coke says, "If the tenant make choice of one plea in bar, and that be found against him, yet he may resort to an action of a higher nature, and take advantage of any other matter; and the law on this point is by them that understand not the reason thereof, misliked, saying, *Nemo prohibetur pluribus defensionibus uti.*" *Co. Lit.* 304. a.

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April 29.

JAMES M. FRENCH v. JOHN T. W. FRENCH.

A., by letter, acknowledges to have received from B. 321*l.* 5*s.* By a contemporaneous account taken between these parties, it appears that 146*l.* 3*s.* 6*d.*, part of the 321*l.* 5*s.*, was a sum due from C. to B., which A. allowed to be transferred to the debit of his account with B. A. is sued by B., *inter alia*, for money lent and upon an account stated. Held, that A. was not liable for the 146*l.* 3*s.* 6*d.*, the arrangement amounting to a promise, without consideration, to pay the debt of another.

ASSUMPSIT, for goods sold, money lent, money paid, and interest, and upon an account stated.

Pleas: except as to 326*l.* 5*s.* (a) non assumpsit, — to that sum, payment into court.

The plaintiff added the *similiter*, and accepted the 326*l.* 5*s.* praying his costs and charges.

The following particulars of demand were delivered.

This action is brought to recover the sum of 491*l.* 5*s.* 4*d.* being the balance of an account of which the following is a copy.

Dr. J. T. W. French.			J. T. W. French. Cr.		
1837.	£	s. d.	£	s. d.	
To principal and interest of old account with Dr. John French, transferred as per letter	146	3 6	Balance carried down this day -	321	5 0
June 29. To sundry sums lent him viz:			London, June 29th, 1837.		
1836.					
18th June £40 0 0					
12th Dec. - 5 0 0					
1837.					
24th Jan. - 10 0 0					
With interest to this day - 2 7 6					
	57	7 6			
To sundry silver spoons, &c. as per invoice, 2d June -	7	14 0			
To cash this day lent him -	110	0 0			
	£321	5 0			
				£321	5 0

(a) It was not stated in what way this sum was made up. The defendant appears to have deducted from the 491*l.* 5*s.* 4*d.* the 146*l.* 3*s.* 6*d.*, and part of the 45*l.* 4*s.* 10*d.*

1837.		£	s.	d.
June 29.	To balance brought down due, <i>J. M. French</i>	321	5	0
1840.				
April 23.	The same with interest to this day, at 5 per cent. - - -	45	4	10
	Your bill, dated <i>Corfu</i> , paid 1838, 2d. <i>Sep.</i> £60	0	0	
	With interest to this day, at 5 per cent.	4	18	6
		64	18	6
	Your bill, dated <i>Malta</i> , paid 1839, 20th <i>Apr.</i> £50	0	0	
	With interest to this day, at 5 per cent.	2	10	0
		52	10	0
		483	18	4
	To a small gold foreign watch - -	7	7	7
		£491	5	4

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The defendant having subsequently obtained an order for the particulars of the first item of 146*l.* 3*s.* 6*d.*, an account was delivered headed “*Dr. — Dr. John French, Dr. John French — Cr.*,” setting forth various receipts and payments between the 22d *June* 1821, and the 27th *March* 1826, leaving a balance against *Dr. French* of 94*l.* 6*s.* 8½*d.*, to which was added interest at 5 per cent. on that sum up to the 25th *March* 1837, amounting to 51*l.* 16*s.* 9½*d.*

At the trial before *Tindal C. J.* at the sittings at *Guildhall* after last *Trinity* term, the plaintiff (a watch and chronometer maker) put in evidence an account signed by the defendant (a naval officer) on the 29th *June* 1837, as in the particulars of demand down to *, and the following unstamped letter, also dated 29th *June* 1837.

“*London, June 29th, 1837.*

“I hereby acknowledge to have received from *J. M. French Esq.*, the sum of 321*l.* 5*s.*; and should I die during my absence from *England*, or at any time before the

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said debt is liquidated, it is my desire that he should be paid out of whatever property I may possess at the time of my death, with legal interest on the same.

J. T. W. French."

The object of this arrangement was said to be to render it unnecessary for the plaintiff to make any claim against the estate of Dr. *French*, who had died at *Bruges* in embarrassed circumstances. It appeared that the two sisters of the defendant had, at a subsequent period, entered into some engagement to pay the amount of the balance due from Dr. *French*. It was suggested that this engagement, as well as the vouchers for the account with Dr. *French*, had been destroyed by the fire which burnt down the *Royal Exchange*, and the plaintiff's premises which adjoined.

For the plaintiff it was contended, that the defendant's letter of the 29th of *June* 1837, was evidence of a loan made by the plaintiff to the defendant, for the purpose of enabling the latter to discharge the debt of 321*l.* 5*s.* due from his father.

For the defendant it was contended, that the letter of the 29th of *June* 1837, amounted to an original engagement and required an agreement stamp, or that it was a contract of guarantee in respect of a bygone debt, and was therefore void for want of an apparent consideration.

Tindal C. J. was of opinion that the document amounted to an acknowledgment, and not an agreement. A verdict was found for the defendant, leave being reserved to the plaintiff to move to enter a verdict for 165*l.* 0*s.* 4*d.* (146*l.* 3*s.* 8*d.* with interest thereon from the 29th of *June* 1837.)

On the first day of *Michaelmas* term, *Bompas* Serjt. obtained a rule nisi pursuant to the leave reserved.

Channell Serjt. (with whom was *Butt*) now shewed cause. The 326*l.* 5*s.* paid into court, covered all the

items in the particulars of demand with the exception of the disputed item of 146*l.* 3*s.* 6*d.* and interest thereon. To interest, it is clear that the plaintiff cannot be entitled. With regard to the debt owing from Dr. *French*, that was barred in 1837 by the statute of limitations, more than six years having then elapsed from the time of the advances being made to him. (a) If this is to be considered as an agreement, fixing the defendant with a debt, it is void for want of a stamp and for want of consideration, no sufficient consideration appearing upon the face of the instrument. It cannot be available as a receipt, no act having been done by the plaintiff to discharge Dr. *French's* estate from this sum.

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Bompas Serjt. (with whom was *James*) in support of the rule. It was never alleged on the part of the plaintiff, that the letter of the 29th of *June* amounted to a new agreement. All that was contended for was, that it afforded evidence of a loan made by the plaintiff to the defendant, for the purpose of enabling the latter to discharge his father's debt, in which object, as one of the next of kin, he was personally interested. That was not expressed to be the ground of the arrangement, but the circumstances surrounding the case, together with the letter, shew what the intention of the parties was. It is the same thing as if the defendant, having borrowed the money of the plaintiff, had taken it out of his pocket to satisfy his father's debt. [*Erskine* J. The plaintiff never meant to discharge Dr. *French*.] It is sub-

(a) The advances consisting entirely of sums paid for bills of exchange, to remit to Dr. *F.* at *Bruges*, where he resided till his death, the operation of the statute might have been avoided, as between the original parties; and it would seem that

a contract to guarantee a debt barred by the statute would bind, if founded upon any other consideration than that of forbearing to sue; and *quære* even as to that exception. *Vide Haigh v. Brooks*, 10 A. & E. 309., 2 P. & D. 477.

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mitted, that the memorandum of the 29th of *June* amounted to a parol acknowledgment that the defendant had received money of the plaintiff for that purpose.

TINDAL C. J. The only question in this case is, whether the plaintiff has a legal right to recover the 146*l.* 3*s.* 6*d.*, and interest upon that sum. To shew the defendant's liability the plaintiff produced two documents. One of them, which purports to be an account stated, contains this entry: "To principal and interest of old account with Dr. *John French*, transferred, as per letter, 146*l.* 3*s.* 6*d.*" From this entry it must be inferred that the sum was originally due from Dr. *French*, the defendant's father. But it is said that this debt was transferred, and that there might be a good consideration for such a transfer. The letter, however, instead of speaking of a transfer, states that the defendant has *received* from the plaintiff the sum of 321*l.* 5*s.* The effect of the two documents, taken together is, to shew that the defendant had allowed himself to be charged in account with a debt due from his father. It is suggested on the part of the plaintiff, that the transaction may be considered as a borrowing of money from the plaintiff, and a payment of the father's debt with the money so borrowed. The substratum of that suggestion must be, that the debt due from Dr. *French* was satisfied. But it is inconsistent with such a supposition, that the plaintiff should afterwards obtain from Dr. *French's* two daughters a note or engagement to pay the same debt. The ground of that suggestion therefore fails (a); and the case stands

(a) As to the distinction between an *ex-promissio*, which discharges the original debtor, and an *ad-promissio*, where the liability is only collateral, see *Vinn. Inst. Imp. Comm.* lib. 2. tit. 1., *de rerum divisione* 175.,

ibid. lib. 4. tit. 6. s. 9., *de constitutâ pecuniâ*, 731.; *F.N.B.* 121 M. note (d); *Pudsey's* case, cited 2 *Leon.* 110.; *Roe v. Haugh*, 1 *Salk.* 28.; *Buckmyr v. Darnall*, 2 *Lord Raym.* 1085. 1087.; *White v. Cuyler*, 1 *Esp.*

as one in which the defendant has undertaken, without consideration, to pay the debt of another, and that, a debt which, at the time the undertaking was given, appears to have been barred by the statute of limitations. (a) The rule must be discharged.

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BOSANQUET J. concurred.

COLTMAN J. The substance of the agreement was a promise by the defendant to pay the debt of his father. To support such an agreement, there must be a sufficient consideration; and, by the statute of frauds, that consideration ought to appear upon the face of the instrument. (b)

ERSKINE J. concurred.

Rule discharged.

N. P. C. 200., 6 *T. R.* 176.; *Anstey v. Marden*, 1 *N. R.* 124. 128.; *Atrey v. Davenport*, 2 *N. R.* 474. 476.; *Drake v. Mitchell*, 3 *East*, 251.; *Bird v. Gammon*, 3 *New Cases*, 883., 5 *Scott*, *N. R.* 213.

(a) *Supra*, 647. (a).

(b) *Vide Wain v. Warlters*, 5 *East*, 10.; *Saunders v. Wakefield*, 4 *B. & Ald.* 595.; *Jenkins v. Reynolds*, 3 *Bro. & B.* 14., 6 *B. Moore*, 86.; *Russell v. Moseley*, *B. & B.* 211., 6 *Moore*, 521.; *Pace v. Marsh*, 1 *Bingh.* 216., 8 *B. Moore*, 59.; *Morley v. Boothby*, 3 *Bingh.* 107., 10 *B. Moore*, 395.; *Newbery v. Armstrong*, *Mood. & Malk.* 389., 4 *C. & P.* 59., 6 *Bingh.*

201., 3 *M. & P.* 507.; *Cole v. Dyer*, 1 *Tyrwh.* 304., 1 *Cro. & Jerv.* 461.; *Peate v. Dickens*, 5 *Tyrwh.* 116., 1 *C. M. & R.* 422., 3 *Dowl. P. C.* 171.; *James v. Williams*, 5 *B. & Ad.* 1109., 3 *Nev. & M.* 196. 200. (b), 2 *Dowl. P. C.* 481.; *Shortreds v. Cheek*, 3 *Nev. & M.* 866., 1 *A. & E.* 57.; *Clancy v. Piggott*, 4 *Nev. & M.* 496., 2 *A. & E.* 473.; *Davies v. Wilkinson*, 10 *A. & E.* 98., 2 *P. & D.* 256.; *Lysaght v. Walker*, 1 *Bligh*, *N. S.* 1.; *Read v. Nash*, 1 *Wils.* 305.; *S. C.* 3 *Wentw. Plead.* 104., 2 *Rich. Pract. C. P.* 24.; *antè*, vol. 1. p. 929. n.

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April 22.

SALTER v. WOOLLAMS and Another.

A. sells to B. a rick of hay, standing on land in the occupation of C., at an entire price, undertaking to deliver it to B. before a certain day, upon request, B. engaging to take it away on or before that day; C. having previously acknowledged the hay to be the property of A., and consented that it should remain on the premises until that day. (a) A. gives an order to C. to permit B. to remove the hay, which C. refuses to do:

Held, a sufficient delivery of the hay, as between A. and B.

ASSUMPSIT. The first count of the declaration stated, that, on the 24th of *July* 1839, the defendants put up to sale by auction two ricks of hay, in two lots, subject to the following conditions, amongst others, that is to say: That the highest bidder should be the purchaser; that, upon the close of the bidding, the purchaser should immediately pay down a certain deposit, in default whereof the lot or lots purchased was or were to be put up again, immediately, and sold; that the remainder of the purchase money should be paid to the defendants, at &c., on the 25th of *July* 1839, and that the lots should be taken away at the expense of the purchaser on or before the 28th of *September* then next; that upon failure of complying with the conditions, the deposit should be forfeited, and the lots resold, the deficiency and all charges to be made good by the defaulter. The count then alleged that the plaintiff became the purchaser of the rick of hay comprised in the second lot, at the price of 30l.; and that afterwards, to wit, on &c., in consideration thereof, and also in consideration that the plaintiff had, at the request of the defendants, promised them to perform and fulfil the said conditions of sale, in all things therein contained on his part, as purchaser of the said second lot, to be performed and fulfilled, they the defendants promised the plaintiff to perform and fulfil all things in the said conditions contained on their part, as sellers of the said second lot, to be performed and fulfilled, and also *to deliver possession* to the plaintiff of the said last-mentioned rick of hay, when the plaintiff should, before the 28th of *September* 1839, at a reasonable time in that behalf, re-

(a) *Vide post*, 652. (a).

quest them so to do; and the plaintiff did then pay to the defendants the said sum of 30*l*. Averment: that although the plaintiff did, before the said 28th of *September* 1839, to wit, on the 2d of *August* 1839, being a reasonable time in that behalf, request of the defendants to deliver to him possession of the said rick of hay so purchased by the plaintiff as aforesaid, and that the plaintiff was then ready and willing to take away the same from the said premises; yet the defendants, not regarding their said promise, did not nor would, when they were so requested as aforesaid, or at any other time, deliver to the plaintiff possession of the last-mentioned rick of hay, but then wholly neglected and refused so to do. By means of which premises the last-mentioned rick of hay has not yet been delivered to the plaintiff, and he has not had possession of the same; and thereby he has lost and been deprived of all the profits and advantages he otherwise would have made and acquired from the last-mentioned rick of hay, if the same had been delivered to him according to the defendants' said promise. The declaration also contained a count for money had and received.

Pleas: first, non assumpsit; secondly, that the defendants did deliver to the plaintiff possession of the last-mentioned rick of hay. Issue on both pleas.

At the trial, before *Tindal* C. J., at the sittings at *Westminster* after *Easter* term, 1840, the following facts appeared: —

A distress was taken on behalf of *J. and R. Aldridge*, for rent due to them from one *Henry Jackson*. Part of the property distrained upon consisted of growing grass, which was afterwards made into two ricks of hay, upon the premises, under the 11 G. 2. c. 19. s. 8. The defendants, as auctioneers, advertised the two ricks of hay for sale by auction in two lots, on the 24th of *July* 1839, the hay to be carried away by the purchaser within one

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week from the day of sale. On the morning of the 24th of *July* the defendants obtained from *Jackson* the following memorandum : —

“ I consent that the ricks of hay now on the premises held by me of *John* and *Robert Aldridge*, Esqrs., shall remain until the 28th day of *September* next ; *being the produce of the crops distrained for rent.* (a)

“ 24th *July* 1839.

“ *H. Jackson.*”

The memorandum was endorsed on the conditions, and read by the auctioneer at the commencement of the sale. One of the ricks was bought by one *Baker*. (b) The second rick was knocked down to the plaintiff for 30*l.*, which he immediately paid.

On the 26th of *July* the defendants sent to the plaintiff the following note, directed to *H. Jackson* : —

“ Please to permit the bearer to remove the rick of hay, lot 2.”

In the following week the plaintiff went to the premises to remove the hay, which *H. Jackson* refused to allow him to do. No question was raised as to the non assumpsit. It was admitted that the issue thereon should be found for the plaintiff, as far as it related to the first count (c), and for the defendant, as to the second count. Upon the issue taken on the second plea, the defendants contended that the verdict should be entered for them,

(a) Supposing the consent of the tenant to the removal of the hay to have been necessary or material, it may be questionable whether this memorandum (unless shewn to have been given with reference to the altered terms of the intended sale) amounts to a permission to enter and remove the hay. The words in italics may, perhaps, be considered as evidence,

—which the plaintiff had, at the sale, *agreed to accept*, — of the defendants’ right to sell. But for such agreement on the part of the plaintiff, *admissions* by *Jackson* respecting the distress would not have been evidence of the fact as between the plaintiff and the defendants.

(b) *Vide post*, 658 b.

(c) *Vide Pothier, Traité du Contrat de Vente*, No. 1. 45. 48.

insisting that such a delivery had been made as the nature of the article admitted of. (a) The Lord Chief Justice, however, directed a verdict to be found for the plaintiff upon the second issue also, reserving leave to the defendants to move to enter a verdict upon that issue, or to enter a nonsuit.

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Bompas Serjt. in the following term obtained a rule in the alternative accordingly. He referred to *Greaves v. Hepke* (b), *Tarling v. Baxter*. (c)

Talfourd Serjt. (with whom was *Knowles*) now shewed cause. The facts of this case are very simple. Before the auction took place it was suggested that the hay could not be removed within the time originally proposed. The question is, whether the defendants did not engage to deliver the article bought; and, if so, whether the engagement was complied with by merely sending a request to the tenant to allow the hay to be taken away. It was not shewn that the plaintiff knew that the hay had been distrained upon (d); but if he had known it, that would not have affected his right to have the article delivered. [*Tindal* C. J. It is more like the case of a wrongful title set up by a third party subsequently to the sale. It is like the case of property being wrongfully taken away by a stranger. *Coltman* J.

(a) The civil law seems to require the fictitious delivery of a bulky article to take place when the article is within sight. See *Pothier, Traité du Contrat de Vente*, No. 313. So in *Dig.* lib. 41. tit. 2. § 1. l. 21. Si jusserim venditorem procuratori rem tradere, cum ea in præsentia sit, videri mihi traditam, Priscus ait; idemque esse si nummos debitorem jusserim alii dare. Non est enim corpore et actu necesse apprehendere

possessionem, sed etiam oculis et affectu; et argumento esse, eas res, quæ, propter magnitudinem ponderis, moveri non possunt, ut columnas, pro traditis eas haberi, si in re præsentî consenserint.

(b) 2 B. & Ald. 131.

(c) 6 B. & C. 360., 9 Dowl. & Ryb. 272.

(d) The memorandum appears, however, to have been read before the sale, *suprà*, 652.

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The plaintiff would have a good right of action against *Jackson*.] The plaintiff had no means of knowing whether *Jackson* was the real owner of the hay or a wrongdoer. [*Tindal* C. J. In the conditions of sale the words are, "To be taken away by the purchaser."] It is submitted that the defendants could not have maintained an action for goods sold and delivered. [*Erskine* J. They might have sued for goods bargained and sold.] It is implied in all contracts of sale that the vendor shall furnish the vendee with the means of having possession of the thing sold. (a) In this case a special condition with respect to the delivery is ingrafted upon the ordinary terms; and the vendors were to arm themselves with authority from *Jackson*; *Smith v. Chance*. (b) The cases cited on moving for the rule merely shew that the property in the hay was in the plaintiff; which is not disputed. The plaintiff would have been a trespasser if he had entered the close; *Anthony v. Haneys* (c)

Bompas Serjt. (with whom was *Whitehurst*) in support of the rule. If the hay had been ever so formally delivered, in the presence of a witness, *Jackson* might have interfered to prevent the removal. But notwithstanding any such interference, the property in the article sold would pass to the purchaser. The property passed by the contract of sale, inasmuch as nothing remained to be done, as weighing, &c. to make the contract of sale complete, — nothing to prevent the property from vesting in the plaintiff. The defendants had not engaged to do any thing as to taking the hay away; it remained on the premises at the risk of the purchaser (d), and as his

(a) Non videtur possessionem adeptus is, qui ita nactus est ut eam retinere non possit. *Dig. lib. 41., tit. 2., l. 22.*

(b) 2 B. & Ald. 753.

(c) 8 Bingham. 186.; 1 Moo. & Scott, 300.

(d) Goods sold are at the risk of the purchaser before delivery, even in those systems

property. Neither *Jackson* in this case, nor the warehouse-keeper in *Greaves v. Hepke*, was shewn to have any interest in the property. They were mere wrongdoers, the possession in law passing when the property passes. In *Phillimore v. Barry* (a), goods were sold to be paid for in thirty days, and if not then removed to be liable to warehouse rent; and it was held that the property vested in the purchaser immediately upon the sale, and remained at his risk. (b).

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TINDAL C. J. I think this case may be disposed of without going into all the matters which have been discussed. The point is, whether there has been a delivery, — whether such a delivery as is contemplated by the declaration has actually taken place. I agree that an auctioneer undertakes to deliver the possession of the property sold to the vendee, or to give to the vendee the means of obtaining possession. Here, the defendants got from *Jackson* a consent that the hay might remain on the premises till the 28th of *September*. That arrangement was afterwards inserted in the conditions of sale, and thereby became part of such conditions. Upon the sale the property in the hay passed to the vendee, and if any accident had occurred the loss would have fallen upon him. (c) On the delivery, the property would vest immediately in the vendee, by the statute of frauds (d). Then, what would be the de-

of jurisprudence in which the old rule prevails, that the property in goods sold is not in the vendor before delivery. "Quum autem venditio et emptio contracta sit, periculum rei venditæ statim ad emptorem pertinet, tametsi adhuc ea res emptori tradita non sit. Utique tamen (venditor) vindicationem rei et conditionem, exhibere debet emptori; quia

sanè, qui nondum rem emptori tradidit, adhuc ipse dominus est. *Inst. lib. 2., tit. 24., §. 3.*

(a) 1 *Campb.* 513.

(b) And see *Elmore v. Stone*, 1 *Taunt.* 458.

(c) *Suprà* 654 (g).

(d) Sect. 17., exempting from disallowance contracts for the sale of goods which are accepted and actually received.

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livery in this case? All that would be incumbent on the auctioneers to do would be to enable the plaintiff to receive the hay, as far as the auctioneers had authority so to enable him. What more could be expected from the auctioneers after they had obtained leave for the hay to remain on the premises? *Jackson* had *attorned* to the sale. I am unable to see why trover would not lie against *Jackson*, independently of the circumstance that the sale took place under a distress.

BOSANQUET J. The hay sold to the plaintiff was not a thing capable of an immediate actual delivery, like a horse or a book. The object of the contract of sale was, that the hay should thenceforth become the property of the buyer. The vendors engaged to make such a delivery as the nature of the article admits of. Then, has such a delivery been made in this case? The hay in question had been, or was supposed to have been, distrained upon for rent. It was found that it would inconvenience the party who might become the purchaser at the auction, should he be bound to remove the hay at the early period originally contemplated. The altered conditions of sale, in which it was stated that the hay might, by the leave obtained from *Jackson*, remain on the premises till the 28th of *September*, were read aloud in the auction-room. That amounted to an agreement by *Jackson*, that the hay might remain so long on the premises. It is the same thing as if the auctioneers had gone to the premises, and had there pointed out the hay, and said to the purchaser, "I deliver that hay to you," and *Jackson* had assented. Instead of that it is agreed that the delivery shall take place at a more distant period. Afterwards *Jackson* refuses to allow the hay to be removed. That is not to affect the defendants. If *Jackson's* agreement to the proposal, that the hay should be allowed to remain on the premises, amounted

to a delivery of the hay to the purchaser (*a*), could the subsequent act of *Jackson*, in preventing the removal of the hay, nullify that delivery? I cannot see why trover might not be brought by the purchaser against *Jackson* upon his refusal to permit the removal of the hay.

I think the plaintiff has established the promise declared on, so as to entitle him to a verdict upon the first issue, and that the defendants have proved the performance of that promise set up in their second plea.

COLTMAN J. It would have been quite different if *Jackson* had not been a party to the agreement. As he was so, I think the delivery sufficient.

ERSKINE J. I am of the same opinion. If, by the averment in the declaration — that the defendants promised to deliver, — any thing more was meant than that the defendants engaged to give to the plaintiff a legal title to remove the hay, I think the defendants would be entitled to a verdict on the first plea, which denies that they promised in the manner alleged in the declaration. *Jackson*, by consenting that the hay might remain till the 28th of *September*, undertook that the purchaser should have the power of removing it at any time before that period. The contract, on the part of the defendants, was merely, that they would give to the purchaser a full legal authority to remove. (*b*)

(On a subsequent day, the same learned judge referred to the case of *Wood v. Manley*, tried before himself in

(*a*) The declaration states a promise to make delivery upon a *subsequent* request; but this would be a delivery contemporaneous with the sale. In the view of the case here taken, it would appear that the verdict upon the first issue should have been entered for the defendants,

and upon the second, for the plaintiff.

(*b*) The civil law appears to superadd the obligation of *vindicating* the undelivered property, notwithstanding that it is at the *risk* of the purchaser. *Vide Inst.* lib. 3. tit. 24. § 3.; *Dig.* lib. 47. tit. 2. l. 80.

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1841. *Somersetshire*, in which his lordship's ruling, in conformity with the view which this court had taken of the principal case, was upheld by the court of Queen's Bench. (a)

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Rule absolute to enter a verdict for the plaintiff, on the first, and for the defendants, on the second issue.

On the next day, *Manning* Serjt. (in the absence of *Talfourd* Serjt.) prayed that a nonsuit should be entered instead of a verdict, the terms of the rule being in the alternative, and an action being pending in the court of Queen's Bench against the same defendants at the suit of *Baker*, the purchaser of the other rick of hay under similar circumstances, in which a similar rule had been obtained. This application was resisted by *Bompas* Serjt., but was acceded to by the court.

Rule absolute for entering a nonsuit. (b)

(a) 11 A. & E. 34., 3 *Perry & Dav.* 5. In that case, the tenant, after assenting to the sale of hay distrained upon, locked his gates, and brought an action of trespass against a purchaser who entered and took the hay; and the court held the licence not revocable. The verdict in that case was, not (as stated in the latter report,) for the plaintiff, but for the defendant, agreeably to the direction of the learned judge (*Erskine* J.), and see *Web v. Paternoster*, *Palmer*, 71.; *Taylor v. Waters*, 7 *Taunt.* 374.; *Hewlins v. Shippam*, 5 B. & C. 221., 7 D. & R. 783.; *Bridges v. Blanchard*, 1 A. & E. 536., 3 N. & M. 691. In *Web v. Paternoster*, and in *Taylor v.*

Waters, there was a consideration for the licence: in the former case, of inconvenience, or, at least, of charge, to the licensee, — the putting of the hay upon the land, — in the latter, of benefit to the promisor, — payment. In *Hewlins v. Shippam* the licence, being by parol, was held void, the interest created being freehold. As to cases in which a licence should be pleaded as a lease, see *The Baron of Dudley v. The Lord of Powles*, M. 5 H. 7, fo. 1, pl. 1.

(b) Upon the authority of this decision, the court of Queen's Bench pronounced a similar judgment in the action brought by *Baker* in respect of the other rick, *antè*, 652.

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ANTHONY STEPHENSON MORRIS by ELIZABETH MORRIS, his next Friend v. THOMAS COX. *April 29.*

COVENANT. The declaration stated, that on the 28th of *April* 1835, by a certain indenture sealed with the respective seals of the plaintiff, the said *E. Morris*, and one *Jacob Bond* (*prolat. in curiam (a)*), the plaintiff did put himself apprentice, to learn his art, and with him, after the manner of an apprentice, to serve, from the 20th day of *April* 1835, unto the full end and term of five and a half years from thence next following, to be fully complete and ended; during which term the said apprentice his master faithfully should serve. (The declaration then set out the usual agreements for service, on the part of the apprentice, and instruction, in the art of tailoring, on the part of the master.) That afterwards, to wit, on &c., by a certain other indenture, then made, and sealed with the respective seals of the defendant, the plaintiff *J. Bond*, and *E. Morris* (*prolat. in curiam (a)*), after reciting that the parties to the first-mentioned indenture had mutually agreed that the said apprentice should be assigned to the defendant,—*J. Bond*, at the request, and by and with the approbation, of the plaintiff and *E. Morris*, did grant, assign, and turn over the plaintiff to the defendant, to serve him as his apprentice, under the conditions and according to the terms of the first-mentioned indenture, *saving and except that instead of the defendant paying the plaintiff part of his earnings, the defendant should find the plaintiff*

An assignment of an indenture of apprenticeship, on which only a 1*l.* stamp was affixed, was held to be receivable in evidence, though the indenture of assignment contained covenants for supplying the apprentice with food, &c. and even for extending the period of the apprenticeship.

(a) In this court the usual declaration plea, or replication, and proper course is, to make &c., of all the deeds pleaded one profert, at the end of the therein.

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— *of the indenture secondly mentioned, for the remainder*
MORRIS *of the said term of five years and a half and one for*
v. *year more : that the defendant did, by the last men-*
[Cox.] *tioned indenture, covenant to accept, take, and receive*
the plaintiff, to be, remain, and continue with him as
his apprentice during the remainder of the said term
of five years and a half, and under the conditions before
mentioned ; and to teach and instruct the said appren-
tice, or to cause him to be taught and instructed, in
the art, mystery, and trade of a tailor, which he then
used : that by virtue of that indenture the plaintiff
afterwards, to wit, on the said 8th day, &c. entered
and was received into the service of the defendant, as
such apprentice as aforesaid, and from thence, until the
plaintiff was so as herein is mentioned, dismissed by the
defendant from his said service, to wit, until the 19th
day of August 1839, continued to serve the defendant
as his apprentice, according to the true intent, &c. First
breach : that although the plaintiff was, when so dis-
missed as hereinafter mentioned, and has always since
been, ready and willing to continue to serve the defend-
ant as an apprentice, and has always well and truly per-
formed all things in, &c. on his part to be performed,
yet the defendant, from the making of the indenture
secondly mentioned hitherto, has not taught or in-
structed the plaintiff, or caused him to be taught or in-
structed, in the said art, mystery, and trade, as he ought
to have done, according to the form and effect of his
said covenant in that behalf, but, on the contrary thereof,
the defendant, after the making, &c., and before the ex-
piration of the term of five years and a half, to wit, on
&c. against the will of the plaintiff, dismissed and dis-
charged the plaintiff from his said service, and then
neglected and refused to teach &c., contrary to the
tenour &c. Second breach : that the defendant, from

the making of the indenture secondly mentioned hitherto, has not found the plaintiff in food, lodging, or clothing, as he ought to have done, according to the form and effect of the said covenant in that behalf, but, on the contrary thereof, &c. Plea: that the second indenture was not the deed of the defendant.

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At the trial before *Erskine* J., at the sittings at *Westminster* after last *Trinity* term, the indenture of apprenticeship, with the assignment indorsed, was given in evidence. For the defendant it was objected, that this assignment could not be read for want of a sufficient stamp. The stamp, which had been affixed since the execution of the deed, was a 1*l.* stamp; but it was contended for the defendant, that besides the assignment stamp of 1*l.*, there ought to have been a further stamp of 1*l.* 15*s.* in respect of the additional stipulations, and particularly the extended term, contained in that instrument. It was answered, that the stipulation in question did not extend the term of the service, but merely regulated the amount of the remuneration for that service. The learned judge overruled the objection, and directed a verdict to be entered for the plaintiff, reserving leave to the defendant to move to enter a nonsuit. The jury accordingly found a verdict for the plaintiff, damages 10*l.* 16*s.*

In the following term, *Bompas* Serjt. obtained a rule *nisi* to enter a nonsuit, against which

Talfourd Serjt. now shewed cause. It was a misapprehension of the effect of the indenture, to say, that the term of the apprenticeship was extended upon the plaintiff's being assigned to the defendant. The clause which has been so misconstrued (a) is nothing more than

(a) *Suprà*, 659, 660.

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a provision that after five years and a half of the apprenticeship have expired, the plaintiff shall have the additional benefit of food, lodging, and clothing for another year. Whether the deed indorsed upon the original indenture of apprenticeship, is to be considered as creating a new contract of apprenticeship, or as an assignment of an existing apprenticeship, a 1*l.* stamp is sufficient. The principles by which this case is to be decided will be found in *The King v. The Inhabitants of Louth* (a), where the rule, by which such cases are to be decided, is laid down. There an indenture, by which an apprentice was bound to serve two masters, consecutively, for four and three years in distinct trades, was held to require one stamp only, because it related to one transaction — “the feeding and teaching of one apprentice.” Whether this instrument be regarded as creating a new original contract of apprenticeship between the plaintiff and the defendant, or as an assignment in which the terms of the engagement as well as the parties are altered, it is submitted that no new stamp was necessary.

Bompas Serjt. in support of the rule. It cannot be denied that with respect to the additional year, the deed of the 8th November 1838 established a new original contract between the plaintiff and the defendant. The deed was intended also to operate as an assignment of the apprenticeship from *Bond* to the defendant. The stamp act draws a marked distinction between assignments and original contracts. An instrument, therefore, which, if it can operate at all, must enure both as an assignment and as a new original contract, requires a double stamp. In the ordinary case of the assignment of a lease for years, if the deed of assignment contained a demise from the landlord for an extended term, it

(a) 8 B. & C. 247., 2 Mann. & R. 273.

cannot be doubted that a mere assignment stamp would be insufficient. In the present case, suppose *E. Morris* had been sued by *Bond* upon the covenants entered into by her in the original indenture, she might have pleaded that *Bond* had assigned over all his interest to a new master. [*Coltman J.* The parties might have cancelled the original indenture, by agreement, by tearing off the seal.] In that case the parties must have executed a new apprenticeship deed with a new stamp. But whatever the effect of such cancellation might be (a) that course has not been adopted in the present case. The case which has been cited was decided upon a ground inapplicable to the present. There, a party by the same instrument agreed to serve two masters; and the court held that such an arrangement might be the subject of an entire contract at common law, and that neither the statute of *Elizabeth* (b) nor the stamp act rendered the combination of the two illegal. (c) Here, the parties having attempted to effect by one instrument two distinct objects, each of which would be liable to stamp duty under different denominations, must take the consequences of having omitted to affix the double stamp upon the double transaction.

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TINDAL C. J. Unless we see that an additional stamp is distinctly imposed by the very terms of the statute, we ought not to yield to the objection. That part of the schedule to 55 G. 3. c. 184. which applies to this case runs thus:—

“ APPRENTICESHIP and CLERKSHIP — Indenture, or other instrument or writing, containing the covenants, or articles, or agreements for, or relating to, the service of any such apprentice, clerk, or servant, as aforesaid, who shall be put or placed to, or with, a new master or

(a) *Post*, 665 (a).(b) 5 *Eliz.* c. 4.

(c) 55 G. 3. c. 184.

1841. mistress, either by assignment, transfer, or turn-over,
 ——— or upon the death, absence, or incapacity of the former
 MORRIS master or mistress, or otherwise, or any writing what-
 v. ever, whereby any such assignment, transfer, or turn-
 COX. over may be effectuated or ascertained.

“Where there shall be any such valuable consideration as aforesaid, moving to the new master or mistress, exclusive of any part of the consideration to the former master or mistress, which may be returned or given, or transferred to the new master or mistress, — such and the like duty, in proportion to the amount or value of such new consideration only, as is before charged on any original indenture of apprenticeship. And where there shall be no such new consideration, if the indenture or other instrument or writing shall not contain more than 1080 words, 1*l*.; and if the same shall contain more than that quantity, 1*l*. 15*s*.”

It appears to me that the term “assignment” alone would have been used, if it had been contemplated that no new stipulations would be introduced. Had the term “assignment” been used alone, the operation of the clause would have been confined to deeds by which the services of the apprentice were transferred to a new master upon the original terms. I cannot see with sufficient certainty that an additional stamp is imposed in such a case as the present; and there ought to be no doubt on the subject before we can say that such stamp is necessary.

BOSANQUET J. I think it is quite clear that the court ought not to require an additional stamp, unless it appears that the obligation is distinctly imposed by the legislature. Here, the apprentice having served his master during part of the original term of five years and a half, an agreement is entered into, by which he is to serve another master for the residue of the term, and also for an additional year; and the question is,

whether the indenture in which that agreement is embodied, an indenture creating the relation of master and apprentice between the defendant and the plaintiff for the residue of the term of five years and a half and one year more, requires two stamps under the enactment which has just been read. This is an indenture containing "the covenants, articles, or agreements" relating to the service of an apprentice with a new master, whereby an assignment of the apprentice is effected, upon which the statute imposes a 1*l*. stamp. I cannot see that any further stamp is expressly required; and, in the absence of an enactment expressly imposing a further stamp, I think the single 1*l*. stamp is sufficient.

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COLTMAN J. It is clear that the clause in question contemplates, not a bare assignment, but also something to be embodied in an assignment. The argument on the part of the defendant would apply to any variation in the terms, as well as to an alteration in the time, of the service. If the parties had cancelled the deed by tearing off the seal, and had made a new deed, the effect would have been the same; and it could not have been contended that such new deed would have required more than the 1*l*. stamp. (a)

(a) As to the effect of the cancellation of deeds, see *Com. Dig. Fairs* (F. 2.); *Mathewson's case*, 5 *Co. Rep.* 22 b.; *Mathewson v. Lydiate*, *Cro. Elis.* 408. 470. 546.; *Ash v. Brudnells*, *Cro. Jac.* 255.; *Maggennis v. Mac Cullough*, *Gilb. Eq. Cases*, 236.; *Roe v. Archbishop of York*, 6 *East*, 86.; *Wootley v. Gregory*, 2 *Young & Jerv.* 536.; *Doe v. Thomas*, 9 *B. & C.* 288., 4 *Mann. & Ryl.* 218.; *Walker v. Richardson*, 2 *M. & W.* 882., 1 *Wms. Saund.* 236 a.

If a deed be delivered up to be cancelled to the party who is bound by it, and it is accordingly cancelled by tearing off the seals or otherwise defacing it, or if the person who has the deed, cancel it by agreement with the other party, it becomes void; *Peres v. Bishop*, *Dyer*, 112 a., *Shepp. Touchst.* 70. But where an estate has actually passed by a deed, the cancelling of it afterwards will not divest any estates out of the persons in whom they were vested by such deed. Thus

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ERSKINE J. I am also of opinion that the enactment contemplated, not a mere assignment, but an assignment in which new terms might be introduced, and that one stamp of 1*l*. was therefore sufficient.

Rule discharged. (a)

where a father, having quarrelled with his eldest son, made a settlement on his wife of 100*l*. a year in augmentation of her jointure; afterwards, being reconciled to his son, he cancelled the deed, and so it was found at his death. On a trial at law, the deed, being proved to have been executed, was adjudged good, though cancelled; *Hudson's case*, *Prec. in Chancery*, 235. If, however, the party to whom the estate is conveyed disagree to the deed, and disclaim the estate before he has done any thing to signify his agreement thereto, the estate is divested out of the party disclaiming, and revested, *ab initio*, in the party conveying, *post*, 701 (a).

(a) Supposing the plaintiff to have been of age on the 8th of November 1838, when his services were transferred to the defendant, the assignment would appear to have enured as a mutual release, extinguishing the first contract; as the acceptance of a demise for a new term of years, operates as a tacit surrender of an existing term.

It has been held, that for the

purpose of gaining a settlement, an indenture of apprenticeship may be assigned by parol, without any writing; *Rex v. East Bridgeford*, *Burr. Sett. cases*, 183., 2 *Bott*, 557. But the assignee could not sue or be sued upon the covenants in the original deed. An assignment, therefore, unless it contained fresh covenants, would leave the apprentice and his new master without mutual remedies. Such an assignment would be nugatory as between the parties, and can hardly be supposed to be the assignment contemplated by the statute.

Upon an assignment reduced to writing, and for a valuable consideration, a stamp was necessary under the 8 *Anna*, c. 8. s. 39.; *Between the parishes of Curenden and Laland, in Lancashire*, 2 *Stra.* 903.; and is so now; *Rex v. The Inhabitants of Fakenham*, 2 *A. & E.* 528., 4 *N. & M.* 553. The stamp duty, upon assignments of apprenticeship, is imposed not only upon indentures, but upon other instruments or writings, whether under seal or not.

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MATHEWS v. TAYLOR.

April 21.

ASSUMPSIT, for goods sold and delivered, and upon an account stated.

The defendant pleaded, first, non assumpsit except as to 125*l.* 8*s.* 5*d.*, and, secondly, as to that sum, — that after the making of the promises in the declaration mentioned as to the said sum of 125*l.* 8*s.* 5*d.* parcel &c., and before the commencement of the suit, to wit, on 1st *November* 1837, the defendant was in bad and embarrassed circumstances, and was indebted to the plaintiff in the said sum of 125*l.* 8*s.* 5*d.*, and to certain other persons respectively in divers other sums of money, and was unable then to pay the plaintiff and the said other creditors of the defendant the said debts in full; whereof they had notice; that thereupon, then, to wit, on the day and year last aforesaid, by a certain agreement in writing, then made, by and between the defendant of the one part, and the plaintiff and the said other creditors of the defendant of the other part, whose names were subscribed to the said agreement, it was agreed, by and between the said parties respectively, (amongst other things), that the defendant should, as soon as his said several creditors should have signed the said agreement, make over and convey to one *Crockett* and one *Cartwright*, two of the said creditors, all his property, both real and personal, in trust to sell, and, after payment of the charges and mortgages thereon, and expenses, to divide the surplus equally amongst his said creditors, parties to the said agreement, according to the amount of their said debts, and to assign to *Crockett* and *Cartwright* certain pay, which the defendant then received as a post-captain in the navy, and

An agreement, whereby a debtor undertook to convey his property to trustees for the benefit of his creditors, contained a proviso that “the said agreement was to be void unless the creditors, whose names and descriptions were stated on the other side of the agreement, should concur in the arrangement.”

Held, that this was not a condition precedent, the performance of which the debtor was bound to aver on setting up the agreement as an answer to an action by one of his creditors.

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a certain pension which he then enjoyed, in such manner as counsel should advise and think right and proper, as a security for payment thereof of 200*l.* per annum, by half yearly payments, to the said trustees in trust, (if the majority of the said creditors in amount at any meeting to be called by them should think fit) to insure the defendant's life for any sum not exceeding 700*l.*, and to pay the annual premiums thereon out of the said annual sum of 200*l.*, and to apportion the remainder thereof, or the whole, as the majority of such creditors in amount should determine, equally among the creditors, parties to the said agreement, until the whole of their debts should be liquidated: that the plaintiff and the said other creditors respectively, thereby then, in consideration of the premises, agreed with the defendant and with each other, that on the defendant executing such conveyance and assignment in trust, in such form, and with such clauses and powers as the said trustees should think proper for fully carrying into effect the said agreement, and so long as the said sum of 200*l.* a-year should be regularly paid to the said trustees in trust as aforesaid, by half yearly payments, the plaintiff and the said other creditors would postpone calling for, or requiring, immediate payment of, their said debts respectively, and would receive the same proportionably under the said trust deed; *but the said agreement was to be void, unless the creditors of the defendant, whose names and descriptions were stated on the other side of the said agreement, should concur in the said arrangement, or in case the defendant should refuse or neglect to execute such trust deed and assignment for one week after notice from the trustees that it was ready for his execution: — that after the making of the said agreement, and so soon as the same had been signed by the said other creditors, and within one week after notice in that behalf from the trustees, and before*

the commencement of the suit, to wit, on the 23d October 1839, by a certain indenture &c., [setting out a deed whereby defendant conveyed to *Crockett* and *Cartwright* all his real and personal property in trust for sale, and also his pension, and his pay as a post captain in the royal navy, and constituted them his attorneys, to ask, demand, &c.]; such conveyance and assignment respectively being duly made by the defendant to the said trustees, in trust, and for the several purposes in the said agreement mentioned and referred to, and in such form, and with such clauses and powers as the said trustees thought right and proper in that behalf for fully carrying into effect the said agreement, according to the true intent and meaning thereof; that the said indenture had ever since remained, and still was in full force and virtue, and that the said annual sum of 200*l.* had been duly and regularly paid, from time to time, by the defendant to the said trustees, in trust as aforesaid, by half yearly payments, according &c.; of all which several premises and matters respectively, the plaintiff, continually, and from time to time, had due notice. Verification.

Replication to the second plea—that the agreement in that plea mentioned was and is a certain paper writing which was intended to become, and which purported and was expressed to be, an agreement made between the defendant of the one part, and the several creditors, to wit, creditors of the defendant, whose names and the amount of whose debts were thereunder by them subscribed, opposite to their respective names of the other part; which agreement was intended to be so subscribed by and with the names of a large number, to wit, fifty persons, being, or claiming to be, creditors of the defendant, the names and description of which persons were stated in a list written on the other side of the sheet of paper, and on which the said agreement was written

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— agreement and in the defendant's said plea, for want of
MATHEWS whose concurrence in the said arrangement in the said
v. agreement and plea respectively mentioned, the said
TAYLOR. agreement was to be void), and which list was signed
by the defendant;—that the amount of debt which
every such person rightfully claimed, was required and
intended to be set to the said agreement, by such per-
son, and opposite to his name, in order that the other
creditors, who were, or might become, parties to the
said agreement, might be able to ascertain therefrom
the amount of such debt, and what sums of money
ought, from time to time, to be paid, by the trustees in
the said agreement mentioned, to every such person;
and which signature or subscription, to wit, the sub-
scription by every such person of his name and the
amount of his debt, was the means by such agreement
required, by which every such person should signify
his concurrence in the said arrangement, and become a
party to the said agreement;—that very few, to wit, six
only, of the persons whose names and descriptions were
stated on the other side of the sheet of paper on which
the said agreement was written, and whose concurrence
was required as thereinbefore mentioned, did, at the
time when such agreement was written, or at any time
since, signify their concurrence in the said arrangement
by the means aforesaid; but that a large majority of the
said persons who did in any manner subscribe the said
paper writing, set thereto their names only, and did not
sign the same in manner and form as aforesaid; that is
to say, did not set opposite to their respective names, or
to any other part of the said paper writing, any state-
ment whatsoever of the debts which they severally
claimed to be due to them from the defendant; whereby
the other creditors of the defendant who had duly
signed and become parties to the said agreement were

and are unable to ascertain therefrom the amount of the debts due to such persons respectively, and the sums of money which ought from time to time to be paid by the trustees in the said agreement mentioned to every such person under the provisions thereof; that divers, to wit, ten of the persons whose names and descriptions were stated on the other side of the sheet of paper on which the said agreement was written, as thereinbefore mentioned, and without whose concurrence in the said arrangement the agreement was to be void, did not, at the time such agreement was written, or at any time since, set their respective names to, or in any manner subscribe, the said agreement; but that such persons had from thence hitherto refused to concur in any manner in the said arrangement—*without this*, that the said other creditors of the defendant, to wit, the several persons whose names and descriptions were stated on the other side of the sheet of paper on which the said agreement was written as thereinbefore mentioned did sign, that is to say, did become parties to the same, in manner and form as in the plea was alleged—concluding to the country.

Special demurrer: assigning, among other causes, that the replication was defective in this, that whereas it was alleged in the second plea, that the agreement was to be void, unless the creditors of the defendant, whose names and descriptions were stated on the other side of the agreement should concur in the arrangement in the agreement mentioned, yet the inducement of the replication did not sufficiently shew that the said persons therein mentioned as having omitted to subscribe, or as having imperfectly subscribed, the agreement, were creditors of the defendant, and that by reason thereof their subscription was in any manner necessary; nor did it sufficiently appear, in or by the said inducement, that

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the statement of the amount of the debts of the respective creditors was, by the terms of the agreement itself, rendered necessary to the effectual execution thereof.

Stephen Serjt., in support of the demurrer. This replication is insufficient, both in form and in substance. The allegation under the *absque hoc* is clearly defective; and independently of that objection, and looking at the inducement (a) in the replication, without the *absque hoc*, it is no answer to the plea. By the express terms of the proviso in the agreement, the parties whose non-concurrence in the arrangement was to make the agreement void, were required to be *creditors* of the defendant. It could never be intended that the nonconcurrence of a party *claiming* to be a creditor, but whose claim afterwards turned out to be unfounded, should have the effect of avoiding the agreement. It is clear that no persons who were not, both *de jure* and *de facto*, creditors of the defendant, could put an end to the arrangement.

TINDAL C. J. The plaintiff should have alleged in his replication, that all the creditors of the defendant whose names and descriptions were stated on the other side of the agreement, did not concur in the arrangement. (b)

Channell Serjt. submitted that the concurrence of such creditors was a condition precedent which the

(a) That a bad special inducement to a traverse makes the whole pleading demurrable, though the traverse itself be well taken, see *Foden v. Haines*, *Comberb.* 245., *Carthew*, 300.; *Johnson v. Rowe*, *Cro. Car.* 265.; *Dike v. Ricks*, *Ib.* 335., *W. Jones*, 327.,

1 *Roll. Abr.* 329., *Com. Dig.* tit. *Pleader*, (G. 20.); 5 *Bac. Abr.* (5th & 6th ed. 399.); tit. *Pleas and Pleading* (H. 5.)

(b) This would have been the form of the *traverse*; and the inducement, if any were used, should have been in unison with such traverse.

defendant, on setting up the agreement, was bound to allege had been performed.

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TINDAL C. J. It is matter *ex post facto*, and any allegation in respect of it should have come from the plaintiff. (a)

Channell then obtained leave to amend, on the usual terms.

Rule accordingly. (b)

(a) *Vide Wynne v. Wynne*, ante, 8., 2 Scott, N. R. 278., 9 Dowl. P. C. 901.

(b) A creditor who executes a composition deed, in which the amount of his debt is left in blank, binds himself to the extent of all his existing claims against the insolvent, although the deed refer to "sums set opposite the names" of the executing parties; *Harrhy v. Wall*, 2 Stark. N. P. C. 195. And

a rule nisi to set aside a nonsuit, which Lord Ellenborough had directed, was refused; 1 B. & Ald. 103. And see *Holmer v. Viner*, 1 Esp. N. P. C. 132.; *Hancock v. Clay*, 2 Stark. N. P. C. 100.; *Daniel v. Saunders*, 2 Chitt. Rep. 564.; *Hudson v. Revett*, 5 Bingh. 368., 2 M. & P. 663.; *Reay v. Richardson*, 2 C. M. & R. 422., 1 Gale, 219.; *Acton v. Woodgate*, 2 Mylne & Keene, 492.

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April 20. 22. The LONDON and BRIGHTON Railway Company
26. , v. G. F. FAIRCLOUGH.

By their act of incorporation, a railway company are required to **D**EBT, for 270*l.*, the amount of two calls of 3*l.* each per share, on forty-five shares, of which the defendant was alleged to be the proprietor. The declaration required to cause the names of the several corporations, and the names and additions of the several persons, who shall be or become entitled to shares in the undertaking, with the number of shares they are respectively entitled to, and the amount of the subscriptions paid thereon, and the proper number by which each share shall be distinguished, to be entered in a book to be kept by the company; and after such entry made, to cause their common seal to be affixed thereto. They are further required to enter and keep, in some book to be provided for that purpose, a true account of the names of the several corporations, and of the names and places of abode of the several persons, who shall be so entitled. The act provides that in order to prove that a defendant is proprietor of the shares in respect of the calls upon which he is sued, the production of the *books* in which the company are directed to enter and keep respectively the names and additions of the several proprietors of shares in the undertaking, with the number of shares they are respectively entitled to, and an account of the names of the several corporations, and of the names and places of abode of the several persons, who shall, from time to time, be entitled to shares in the undertaking, shall be *prima facie* evidence that such defendant is a proprietor, and of the number and amount of his shares: Held, that in order to shew proprietorship under the last-mentioned enactment, it is incumbent on the company to produce, as well the book required to be kept by the first, as that required to be kept by the second, of the above clauses; but that provided the name and addition of the defendant are properly described, it will be no objection to the sufficiency of the evidence, that the additions of other proprietors are omitted.

Where a clause in an act empowering directors of a railway company to make calls, requires twenty-one days' notice to be given of every call, by advertisement, and directs that moneys so called for, shall be paid to such persons, and at such times and places, as in such notice shall be appointed; and the act directs that at the trial of any action for a call, it shall only be necessary to prove that the defendant was a proprietor of such share or shares in the undertaking as such action is brought in respect of, or some one such share, and that such notice was given, as directed by the act, of such call having been made, without proving the appointment of the directors, or any other matter; it is sufficient to state the place and the time of payment, in the advertisement, without noticing either, in the resolution for making the call, such statement being made with the previous or subsequent assent of the directors; which assent will be presumed.

A railway act makes the shares transferable by deed, and directs that on every sale, the deed being executed by the seller and the purchaser, shall be kept by the company, or by the secretary or clerk of the company, who shall enter, in some book to be kept for that purpose, a memorial of such transfer and sale,

ation laid the damages for the detention of the debt, at 1841.
50%.

Pleas: first, *nunquam indebitatus*; secondly, a traverse of the proprietorship of the shares, or of any of them: concluding to the country.

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At the trial, before *Tindal C. J.*, at the sittings at *Guildhall*, after *Hilary* term, 1840, the plaintiffs, in order to prove the affirmative of the second issue, called their clerk, who produced a book which he stated to be The sealed register of the proprietors, which the wit-

and indorse the entry of such memorial on the deed of sale or transfer; and that until such memorial shall have been made and entered, the seller shall remain liable for all future calls, and the purchaser shall have no part or share in the profits: Held, that in order to shew a party sued for calls, to be a proprietor under such a deed of transfer, it is not necessary to prove that a memorial of the transfer has been entered.

The deed of transfer was executed by *A.* the seller, with the name of *B.* inserted as the purchaser; before any execution of the deed by *B.*, it was arranged that *C.* instead of *B.* should be the purchaser; whereupon the name of *B.* being struck out and that of *C.* substituted, *A.* re-executed the altered deed: Held, that the deed was so far complete as between *A.* and *B.* that it could not operate as a conveyance to *C.* without a new stamp. *Quære*, whether it might have been shewn that *B.*'s name had been inserted by mistake.

A railway act authorizes the directors to sue for calls, or to declare the shares belonging to any person or corporation refusing or neglecting to pay, to be forfeited, and to order the same to be sold; provided nevertheless, that no advantage shall be taken of any forfeiture of shares until notice in writing given, nor until the declaration of forfeiture shall have been confirmed at a general or special general meeting of the company; after which requisites have been complied with, the company are authorized to sell the shares so forfeited. It was admitted, (a) that a declaration of forfeiture by the directors, with such notice in writing, is, without such confirmation, no defence to an action for calls.

A railway act authorizes the company of proprietors to recover, in an action of debt, what shall be due for calls, *including interest on such calls*. It was admitted (b), that interest was recoverable (c) under a count for calls (the damages laid being sufficient to cover the amount) without a count for interest.

A railway act requires that the proceedings of all meetings shall be entered in some book, and signed by the chairman of such respective meetings. Signature at a subsequent meeting, — at which the minutes of the former were read over and confirmed, — by a person who was chairman at both meetings, was admitted (d) to be sufficient.

(a) *Infrà*, 689, 690.

(b) *Infrà*, 690.

(c) *Quære*, as a statutory addition to the debt demanded,

or as damages for the detention. *Vide post*, 684, 685.

(d) *Infrà*, 686.

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ness said was the book kept at the office of the company for entering the names and additions of the proprietors of shares. One portion of the book was stated to have been written three weeks before the first general meeting of the proprietors in *January* 1838, and the remainder, three weeks before the second meeting of the proprietors in *July* 1838, each portion of the book purporting to contain the names of all the shareholders at the time, — the end of each list being sealed with the plaintiffs' common seal. In that book the defendant was registered as the owner of 105 shares. It was contended, on the part of the plaintiffs, that this was sufficient proof of ownership under the 140th, the 142d, and the 148th sections of the *London and Brighton* railway act. (a) By the first of those sections the company are required, at their first or some subsequent general meeting, and afterwards, from time to time, to cause the names of the several corporations, and the names and additions of the several persons, who shall then be, or who shall from time to time thereafter become, entitled to shares in the said undertaking, with the number of shares which they are respectively entitled to, and the amount of the subscriptions paid thereon, and also the proper number by which every share shall be distinguished, to be fairly and distinctly entered in a book to be kept by the said company, and, after such entry made, to cause their common seal to be affixed thereto. By the 142d section the company are required, in some proper book to be provided by the company for that purpose, to enter and keep a true account of the names of the several corporations, and of the names and places of abode of the several persons, who shall, from time to time, be entitled to

(a) 7 W. 4. & 1 Vict. Croydon railway to Brighton, c. cxix., "An act for making a with branches to Shoreham, railway from the London and Newhaven, and Lewes."

shares in the undertaking. The 148th section contains a provision that in any action to be brought by the company against any proprietor of any share in the undertaking to recover any money due and payable to the company for or by reason of any call made by virtue of the act, — in order to prove that the defendant was a proprietor of such share or shares in the undertaking, as alleged, the production of the books in which the company are directed by the act to enter and keep respectively the names and additions of the several proprietors of shares in the undertaking, with the number of shares they are respectively entitled to, and an account of the names of the several corporations, and of the names and places of abode of the several persons, who shall, from time to time, be entitled to shares in the undertaking, shall be *prima facie* evidence that such defendant is a proprietor, and of the number and amount of his shares therein.

It appearing that, although the name and addition of the defendant were correctly stated in the book produced, the names of many other proprietors were entered without additions, it was objected that this book, not having been kept in the manner required by the statute, was not receivable in evidence. It was also objected that, as the 148th section spoke of the production of the *books* directed to be kept as prescribed by the 142d as well as the 148th section, it was incumbent on the plaintiffs to produce both books, whereas one only was shewn. It turned out, that though the defendant's name appeared in the book at the time the second call was made, his name had not been entered at the time the first call (3d May 1838) was made. To supply this defect the plaintiffs proposed to revert to the 155th section of their act, which provides "that it shall be lawful for the several proprietors of the shares of the said undertaking, and their respective executors and

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administrators and successors, to sell and dispose of any shares to which they shall be entitled therein, subject to the rules and conditions herein mentioned, and the form of conveyance of shares shall be by writing, duly stamped [which form (a) is then given], and on every such sale the deed of conveyance, *being executed by the seller and purchaser*, shall be kept by the said company, or by the secretary or clerk of the said company, who shall enter in some book to be kept for that purpose a memorial of such transfer and sale, and indorse the entry of such memorial on the said deed of sale or transfer; and until such memorial shall have been made and entered as before directed, the seller of such share shall remain liable for all future calls, and the purchaser shall have no part or share of the profits of the said undertaking, nor any interest in respect of such share paid to him, nor any vote in respect thereof as a proprietor of the said undertaking." The plaintiffs put in a deed of transfer dated the 12th of *February* 1838, from one *Flood* to the defendant. It appeared, however, that this deed had been at first prepared as a transfer from *Flood* of these shares to one *Howell*, whose name was inserted as the purchaser and transferee. In this form the deed was executed by *Flood*, who thereupon received the purchase money from *Ewart* and *Bell*, who had negotiated the purchase as *Howell's* brokers. Instead of obtaining the execution of the deed by *Howell*, *Ewart* and *Bell* brought back the deed to *Flood*, when, by the direction of *Ewart* and *Bell*, and with the consent of *Flood*, the name of *Howell* was struck through with a pen (b), and that of the de-

(a) Which see in *Hebblewhite v. M'Morine*, 6 M. & W. 205. n.

(b) "If a bond be delivered to another to the use of the obligee, and it is tendered to him and he refuses it, now the

delivery has lost its force, and the obligee can never after agree to it; and, therefore, the obligor may say, that it is not his deed." 5 Co. Rep. 119 b.; *Whelpdale's* case. So, if a bond be made to a *feme covert*, and

fendant was substituted. *Flood* re-executed the deed, passing his pen over his own name; whether the pen was dry or wet the witness was unable to state. The deed was also executed by the defendant.

Upon this state of facts it was contended, on the part of the defendant, that the deed was complete as a transfer from *Flood* to *Howell*, and that the same instrument could not, at least without a fresh stamp, be re-executed so as to pass an interest in the same shares from *Flood* to a new and independent purchaser.

The plaintiffs also put in a deed of transfer of other shares to the defendant from one *Buckingham*; to which deed no objection was taken.

Both deeds were left at the company's office for the purpose of a memorial being entered, as directed by sect. 155., and an indorsement of the entry of such memorial appeared upon each deed as follows:—

“ A memorial of the within transfer was entered, pursuant to the act of parliament incorporating the company, on the 12th day of *March* 1838, in a book kept by the said company for that purpose, intituled ‘ A memorial or register of transfers.’

“ Witness my hand, *T. Wood*,

“ Entered.”

“ Secretary to the company.”

The book in which the memorials were entered was not produced.

the husband disagrees to it, the obligor may plead *non est factum*; for, by the refusal, the bond lost its force, and became no deed; *Ibid.* And see *Donne v. Cornwall*, P. 1 H. 7, fo. 15, pl. 2.; *Butler and Baker's case*, 3 Co. Rep. 25, 26 b.; *Taw v. Bury*, 1 Anders. 4., and *Dyer*, 167.; Co. Entr. 145.

In the principal case it was

not shewn that *Howell* had refused to accept the transfer. A mere refusal or omission on the part of *Howell* to reimburse to *Ewart* and *Bell* the sum they had paid on his account, and by his authority, to *Flood*, would not, of course, have the effect of avoiding the deed, and revesting the shares in *Flood*. *Vide supra*, 675. marg.

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It was contended, on the part of the plaintiffs, that by the memorial both deeds were made effectual, notwithstanding the objection to the transfer from *Flood*. For the defendant it was urged, that by reason of the non-production of the book in which the memorials were entered, the proof as to both of the transfers was incomplete.

In support of the affirmative of the first issue, the plaintiffs put in their minute-book, in which were two resolutions of the directors, each for a call of 3*l.* per share, the one, made on the 3d of *May*, the latter, on the 23d of *August* 1838. The course pursued with respect to entering the proceedings at these meetings was, to take rough minutes as the business of the meeting proceeded, and to transcribe these minutes, at some time after the meeting, into the company's minute-book. The minutes so entered were read over at the next meeting, after which they were confirmed by such meeting, and signed by the chairman, who had also presided at the previous meeting.

The resolutions were as follows : —

“ 3d of *May* 1838.

“ Resolved,—that a call of 3*l.* per share be made, and that notice be given, according to the act of parliament, after the lapse of a week from the date of insertion of the contracts now read.”

“ 23d of *August* 1838.

“ Resolved,—that a call of 3*l.* per share be immediately made, payable on the 17th day of *October* next.”

(a) In general, the minutes of a former meeting are signed by the chairman of the meeting by which minutes of the former meeting are confirmed, the

signature of the chairman being the expression of the assent of the confirming parties through the chairman as their agent.

It was objected, on the part of the defendant, that both these resolutions were bad, *ex facie*, the latter resolution being silent as to the place of payment, and the former, specifying neither time nor place.

By the 146th section the directors are to have power to make such calls of money from the subscribers to, and proprietors of shares in, the said undertaking, to defray the expenses of, and carry on the same, as they, from time to time, shall find necessary, so that the aggregate amount of calls made, or principal money paid, for or in respect of any such shares, shall not amount to more than 50% on any share of that amount, and so that no such call shall exceed 10% upon each such share which any person or corporation shall be possessed of, or entitled unto, in the said undertaking; and that the total amount of such calls, in any one year, shall not exceed 25% upon each such share, and so, in proportion, for all shares of less amount, and so that an interval of three calendar months, at the least, shall always elapse between the day appointed for payment of one call and the day appointed for payment of the next succeeding call; and that twenty-one days' notice, at the least, shall be given of every such call, by advertisement, inserted in one or more *London* newspaper or newspapers, and in one or more *Brighton* newspaper or newspapers; and that all moneys, so called for, shall be paid to such persons, and in such manner, as in such notice shall be appointed, and the respective owners of shares in the said undertaking shall pay their ratable proportion of the moneys to be called for as aforesaid, to such persons, *and at such times and places*, as shall be appointed as aforesaid; and that if any owner of any such share shall not so pay such his ratable proportion, then and in such case, and as often as the same shall happen, such owner shall pay interest for the same after the rate of 5 per cent. per annum, from the day appointed

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for the payment thereof up to the time when the same shall be actually paid; and that if any owner of any such share shall neglect or refuse so to pay such his ratable proportion, together with the interest, if any, which shall accrue for the same, then, or at any time thereafter, it shall be lawful for the said company to sue for and recover the same in any of Her Majesty's courts of record, by action of debt, or on the case, or by bill, suit, or information, or the said directors may, and they are thereby authorised to, declare the shares belonging to any person or corporation so refusing or neglecting to pay any such calls, together with interest, in manner last aforesaid, to be forfeited, and to order the same to be sold, subject to the provisions of this act; provided nevertheless that no advantage shall be taken of any forfeiture of any share in the said undertaking until notice in writing, under the hand of two directors, or the secretary or clerk of the said company, of such share having been declared by the directors forfeited, shall have been given, or sent by the post, unto, or delivered to some inmate of the last or usual known place of abode of the owner of such share, or in the case of a corporation, of the clerk of such corporation, nor until the declaration of forfeiture of the said directors shall have been confirmed, either at a general or special general meeting of the said company, held after the expiration of three calendar months, at the least, from the day on which such notice of forfeiture shall have been given as aforesaid; and that after such declaration of forfeiture shall have been confirmed by such general meeting, &c., the said company, by an order to be made at the same or any subsequent general meeting, or special general meeting, shall have power to order the said directors to dispose of the shares so forfeited, or any of them, in manner by this act directed; and the said directors may, in that case, sell and dispose of such

shares at a public auction or by private contract, and together or in lots, or in such other manner, and for such price, as they may think fit; and that a declaration, pursuant to the 5 & 6 W. 4. c. 62., made by some credible person, not interested, before any justice of the peace, or before any master, or master extraordinary, in the High Court of Chancery, stating that such call had been made by the said directors, and that such notice had been given, and that such default in payment had been made in respect of the share so sold, and that the same share had been declared to be forfeited, and that such declaration had been confirmed in manner hereinbefore mentioned, shall be sufficient evidence of the facts therein stated; and the purchaser of such share shall not be bound to see to the application of his purchase money, nor shall his title to such share be affected by any irregularity of proceeding in reference to such sale; but such declaration, and the receipt of the treasurer, or any two directors of the said company, for the price of such share, shall be sufficient evidence of title thereto for all purposes whatsoever.

By the 148th section it is enacted, that in any action to be brought by the said company against any proprietor of any share in the said undertaking, to recover any money due and payable to the said company for or by reason of any call made by virtue of this act, it shall be sufficient for the said company to declare and allege, that the defendant, being a proprietor of a share or so many shares (as the case may be) in the said undertaking, is indebted to the said company in such sum of money as the call or calls in arrear shall amount to, for a call, or so many calls, of such sum or sums of money upon a share, or so many shares, belonging to the said defendant; whereby an action hath accrued to the said company by virtue of this act; without setting forth the special matter; and on the trial of such action it

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By the 187th section it is required, that the orders and proceedings of all meetings, as well general as special, of the said company, and of the said directors, and also of the said committees, be entered in some book or books to be provided and kept for that purpose, and be signed by the chairman of such respective meetings; and such orders and proceedings, when so entered and signed, are to be deemed original orders and proceedings, and allowed to be read in evidence in all courts, and before all judges, justices, and others, and that, without proof of such respective meetings having been duly convened, or of the persons making or entering such orders or proceedings, being proprietors, or being directors, or members of the committee.

The Lord Chief Justice overruled the several foregoing objections, in point of form, reserving to the de-

defendant leave to apply to the court upon the several points above mentioned, as also upon an objection that interest was not recoverable under the declaration, in which there was no count for interest.

The defendant then entered upon his case, and produced a notice of forfeiture, in a letter from the secretary, bearing date the 6th *December* 1838, pursuant to a resolution of the directors declaring the defendant's shares to be forfeited.

The plaintiffs, in reply to this evidence, put in the minute book of the proceedings at a subsequent general meeting of the company, at which it was resolved — that the forfeiture of the shares should not be confirmed at that meeting, but that the directors should be instructed to take the necessary steps to enforce the payment of the second and third calls (the two calls in respect of which the action was brought), and also of the fourth and fifth calls, against any of the defaulters, as they should see fit. To this piece of evidence it was objected that these resolutions were not properly signed, — the signature of the chairman being insufficient, on the ground that such signature had not been affixed at the time the resolution was come to.

A verdict was returned for the plaintiffs for 290*l.* 15*s.* 7*d.* in one entire sum, the calls being 270*l.*, and interest thereon 20*l.* 15*s.* 7*d.* (a), leave being reserved to the defendant to move to enter the amount of a nonsuit, or to reduce the verdict by the calls, &c. on *Flood's* shares.

Bompas Serjt. in the following *Easter* term, obtained a rule calling upon the plaintiffs to shew cause, why a nonsuit should not be entered, or why the verdict should not be reduced, or a new trial had.

The application was made upon eight distinct grounds, which fully appear in the course of the argument.

(a) *Vide supra*, 675. (b).

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(a) *Vide supra*, 675. (b).

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Kelly (with whom was *Swann*), now shewed cause.

1. The first of the numerous objections upon which this rule was obtained is, that the minute-book was not admissible in evidence, because the signature of the chairman was not affixed at the meeting at which the resolutions were passed. [*Bompas* Serjt. I admit that this objection is disposed of by the decision in *The Southampton Dock Company v. Richards. (a)*]

2. The second objection is, that the time at which the calls were to be paid is not stated in the resolution; and further, that the place of payment is also omitted. The answer to this objection is, that the act does not require the directors to appoint either time or place of payment in the resolution. It is sufficient if they appear in the notice. This depends upon the language of the 146th section (*b*), which shews indeed that the time must be *determined*, but no where requires that the time shall be embodied in the resolution. It may very well be that it will appear to be necessary that a call be made, and that a resolution shall be entered into to that effect, but the time at which the payment is to be made may be left for after consideration. There is nothing in the act to prevent the directors from deciding upon the making of a call, on one day, and fixing the time of payment, on another. It is in the notice, and not in the resolution, that the time at which the calls are to be paid is required to appear. The words "such time and place as shall be appointed as aforesaid" refer to the appointment in the notice, which is mentioned immediately before, and not to the terms of the resolution. In the 148th section, which prescribes what it shall be necessary to prove in actions for calls, no mention is made of the resolution under

(a) *Antè*, Vol. I. 448., 1 (b) *Suprà*, 681.
Scott, N. R. 219.

which the calls are made. The necessity for such proof is directly excluded by the very terms of the 148th section, which declares "that it shall only be necessary to prove that the defendant at the time of making such respective calls was a proprietor of such share or shares in the said undertaking, as such action is brought in respect of, or some one such share, *and that such notice was given, as is directed by the act*, of such call or calls having been made, without proving the appointment of the directors who made such call or calls, *or any other matter whatsoever.*" The case of *The Great North of England Railway Company v. Biddulph*, decided in the Exchequer in November last (a), is directly in point. The 111th section of that company's act (b) corresponds precisely with the 146th section of the *London and Brighton* railway act. In that case the resolution stated the time at which the call was to be paid, without designating the place at which, or the person to whom, the payment was to be made; but the notice of the call, duly advertised, specified the time and place of payment, and the person to whom the payment was to be made. The court held, that the publication of the notice must be assumed to be the act of the directors, and also that the call was properly made. [*Bompas Serjt.* No point will be raised as to the omission of the *place* of payment, in the resolution.]

3. The next objection is, that the register-book was inadmissible in evidence. That book, it is true, was made up after the first call had been made. This defect was supplied by shewing the time of the actual transfer of the shares to the defendant; otherwise it would appear to have been a good objection. The objection does not, however, apply to the second call, which was made after

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(a) Since reported, 7 *M. & W.* 243.

(b) 6 & 7 *W. & A.* cap. cv.

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the time at which the defendant's name appears in the book as a proprietor. At the time of the second call the defendant's name had been entered in the book. As far as relates to that call the objection is, that the book was not kept in the precise form prescribed by the act, the additions of several purchasers, though not that of the defendant, being omitted in the book. The answer is, that this enactment is merely *directory*. Non-observance, therefore, of the forms prescribed by the statute does not affect the admissibility of the book in evidence; *The Southampton Dock Company v. Richards. (a)*

4. The next objection is, the non-production of the book in which the company are required, by the 142d section, "to enter and keep a true account of the names of the several corporations, and of the names and places of abode of the several persons, who shall, from time to time, be entitled to shares in the undertaking." The answer to this objection is a very short one, — the book *was* produced. (This was distinctly denied by *Bompas Serjt.*; and the Lord Chief Justice not finding the fact in his notes, the court directed the circumstances relating to the production or non-production of this book at the trial, to be stated upon affidavit.) (b)

5. The next objection is that the transfers were not memorialised, it not being shewn that a memorial of the transfer had been entered in some book, as required by the 155th section. But the onus lay on the defendant. The transfer—which the plaintiffs proved—threw upon the defendant the burthen of causing the transfer to be memorialised. [*Tindal C. J.* You are bringing an action against the defendant as a purchaser. It lies, therefore, upon you to shew that the transfer was complete. *Coltman J.* The seller is a

(a) *Antè*, Vol. I. 448., 1
Scott, N. R. 219. *S. P. The*
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606., 2 *Scott, N. R.* 705.

(b) *Vide post*, 704.

person interested in the memorial.] A certificate of the memorial is indorsed upon the deed of transfer. This is an act done by an officer of the company, in the performance of a duty imposed upon him by this section; *Kinnersley v. Orpe* (a), *Doe dem. Griffin v. Mason* (b), *Doe dem. Lewis v. Bingham*. (c)

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6. The next objection, which goes to part of the demand only, is, that the transfer from *Flood* to the defendant was inadmissible for want of a second stamp. This is not a conveyance at common law, but under the provisions of a statute which requires the execution of the purchaser. Until that execution had been obtained, the matter remained *in fieri*. [*Tindal* C. J. Suppose the case of indentures of lease and release, executed by the seller.] There, the estate passes without execution of the deeds on the part of the purchaser. (d) Here, nothing is taken out of the transferor until acceptance of the transfer by the transferee; and if the transferor had alone executed the deed, the estate would have remained in him; *Jones v. Jones* (e), *Murray v. Earl of Stair* (g), *Matson v. Booth* (h), *Spicer v. Burgess*. (i).

7. The next objection, — that the defendant had ceased to be a shareholder, his shares having been declared to be forfeited, — is answered by the case of *The Edinburgh Leith and Newhaven Railway Company v. Hib-*

(a) 1 *Doughl.* 56. And see 2 *Bac. Abr.* (5th and 6th ed.) 35: *Rex v. Hopper*, 3 *Price*, 495; *Rowe v. Brenton*, 3 *M. & Ryl.* 218. 220. 223.; *Doe dem. Williams v. Lloyd*, ante Vol. I. 671, &c., 1 *Scott, N. R.* 505.

(b) 3 *Campb.* 7.

(c) 4 *B. & Ald.* 672.

(d) The release usually contains a recital (under the seal of the releasor), that the bargainee-relessee is in actual pos-

session, by virtue of the indenture of bargain and sale, and of the statute of uses, which he could not be, if the bargain and sale remained *in fieri*. As to the disclaimer of a use, *vide post*, 691. (c).

(e) 3 *Tyrwh.* 890. 1 *Cro. & M.* 721.

(g) 2 *B. & C.* 82. 3 *Dowl. & R.* 278.

(h) 5 *M. & S.* 223.

(i) 4 *Tyrwh.* 598.; 1 *C. M. & R.* 129.

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blewhite. (a) (*Bompas* Serjt. admitted that after that decision, it could not be successfully contended that the forfeiture, not confirmed at a meeting of the company, would exempt the party from liability.)

8. The last objection goes to the right to recover interest upon this declaration. (*Bompas* Serjt. I admit that the court has disposed of that question by their decision in *The Southampton Dock Company v. Richards.* (b))

Bramwell (for *Swann*) on the same side. With respect to the objection that the deed was re-executed without a fresh stamp, it may be admitted that if the first stamp was *occupied*, a second stamp was necessary. But it never was occupied; for, according to the argument addressed to the court when the rule was obtained, no one ever was, or could be, entitled to the shares under the first execution of the deed. If the assignee of a bankrupt does not accept, no estate passes to him. (c) The subject of the vesting and disclaiming of estates is discussed at length in 4 *Mann. & Ryl.* 189., in a note to *Small v. Marwood.* (d) In *Sheppard's Touchstone*, 285, there cited (e), it is said that feoffments, gifts, grants, and leases may be avoided by the disagreement of the party to whom they are made; and if it be a lease for years that is made, he may waive and avoid that by word of mouth in the country, as well as a gift of

(a) 6 *M. & W.* 707.

(b) *Ante*, Vol. I. 448., 1 *Scott, N. R.* 219.

(c) The assignment in bankruptcy is a conveyance not of specific property, but of all the property of the bankrupt which can be made available to the payment of his debts. Whether a particular article of property is so available, is to be determined by the discretion of

the assignees. The assignment in bankruptcy is peculiar in its operation. *How v. Kennett*, 5 *Nev. & M.* 1.

(d) And see *Co. Litt.* 113 a, 114 b, 245 a, 258 a; 3 *Tho. Co. Litt.* 18. 57. 58. *Freeman's Reports* by *Smirke*, 503 n. *Nicholson v. Wordsworth*, 2 *Swanst.*, 365. 371. *Stacey v. Elph*, 1 *Myline & Keene*, 195.

(e) 4 *M. & R.* 191.

goods (a), or an obligation delivered to his use (b); but if it be an estate of freehold, that is made by feoffment (c),

(a) In *M. 7 E. 4*, fo. 20, pl. 21., it is however said, "*Nota*, that it was held by *Choke* (Chief Justice of C. P.), and others of the justices, that if a man make a deed of gift of his goods to me, that is good and effectual without delivering the deed to me, until I disagree to the gift; and that should be (covient estre) in a court of record," &c. *Quære*, whether the resolution of the judges may not have been confined to the first proposition, the second, and more disputable, proposition, printed in italics, being added by the reporter.

With respect to gifts of chattels *inter vivos*, the rule appears to be this: Gifts by parol, i. e. gifts made verbally, or in writing without deed, (as to which, see 2 *Roll. Abr.* 62.; 14 *Vin. Abr.* 123.), are incomplete, and are revocable by the donor, until acceptance, that is, until the donee has made some statement, or done some act, testifying his acquiescence in the gift; but gifts by deed are complete, and irrevocable by the donor, upon the execution of the deed, and vest the property in the donee until the latter disclaims, which he can do at any time before he has made any statement, or done any act, inconsistent with such disclaimer, (which disclaimer, notwithstanding the above case in *M. 7 E. 4*., may, by what appears to be the better opinion, be made *in pais*, and that, by parol.) After acceptance of the gift by parol, and until disclaimer of the gift by deed,

the estate is in the donee without any actual delivery of the chattel which forms the subject of the gift; see *Perkins, Grant*, 57; *Com. Dig. tit. Biens*, (D 2.)

By the *Code Civil*, No. 938., "A donation *inter vivos*, duly accepted, shall be perfect by the sole consent of the parties; and the property in the articles so given shall be transferred to the donee, without any other delivery being necessary."

But where a *donatio mortis causâ* is made, the property does not vest without delivery; *Smith v. Smith*, 2 *Stra.* 955.; *Bunn v. Markham*, 2 *Marshall*, 532. *Reddel v. Dobree*, 10 *Simons*, 244. In *Irons v. Smallpiece*, 2 *B. & Ald.* 551., it was ruled at nisi prius by *Abbott J.*, that a delivery was necessary to complete a gift *inter vivos*; and, upon a motion by *Gurney* to set aside the nonsuit, the court refused to grant a rule, under an impression that the point had been decided in *Bunn v. Markham*,—the distinction between *donationes inter vivos* and *donationes mortis causâ*, (which run through the previous cases,) not being adverted to. *

(b) *Vide supra*, 678 b.

(c) At common law, a use might be disclaimed by parol; and, therefore, the beneficial interest in a trust estate may be so disclaimed by *cestui que trust*, at this day. But it has been held that an estate of freehold, vested by the statute of uses, (whether the conveyance under the statute operates with or without transmutation of possession,) cannot be

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it seems he cannot waive and avoid that but in a court of record." Under sect. 155. the transferor is to remain liable until a memorial is entered. This provision, introduced for the protection of the company, is not to be set up as a defence by a party who has accepted a transfer, but has omitted to cause a memorial to be entered. In *Spicer v. Burgess* (a), a deed releasing an intended witness was executed, and was handed over by the releasor to the releasor's attorneys, to be given to the witness, *if it should become necessary at the trial.* (b) Previously to its being so used, it occurred to counsel that another witness might be necessary; and, accordingly, the deed was altered by the insertion of the name of a second releesee, and by adapting the words of the deed to that insertion. Being thus altered, the deed was re-executed before any delivery over to the witness. Lord *Lyndhurst* C. B., in delivering the judgment of the court (c), says, "No doubt, if the deed had, in the first instance, been so completely executed that the stamp was once *occupied*, no further use could have been made of it, and a re-execution would have required a fresh stamp. But so long as it remained *in fieri*, it was not completely executed, and the stamp was not occupied." — "The deed, though completely executed in point of form, was placed in the hands of the attorney, only to be used *in case it*

divested by a parol disclaimer. *Butler and Baker's case*, 3 Co. Rep. 27 a. *Vide post*, 701 a.

(a) 4 Tyrwh. 598.; 1 Cro. M. & R. 129.

(b) As the delivery of the deed to the attorney of the releasor, was to operate as a release to the party named as releesee, only on the contingency of that party's being called as a witness at the trial, such delivery would appear to

be merely a delivery as an escrow, leaving the ultimate and operative delivery, to the intended releesee, countermandable. And see *Slater v. Carne*, 4 Dougl. 222.; *Johnson v. Baker*, 4 B. & Ald. 440.; *Cecil v. Butcher*, 2 Jac. & W. 573.; *Hare v. Horton*, 5 B. & Ad. 715., 2 Nev. & M. 428.

(c) 4 Tyrwh. 605.; 1 Cro. M. & R. 134.

became necessary. We think that, under these circumstances, the execution of the deed in question was *in fieri* only, and that the re-execution did not make a new stamp necessary."

Even supposing a memorial to be necessary, the evidence of the transfer was complete; for the register of the shareholders was produced, and, in that register, the name of the defendant appeared. This, it is submitted, was a sufficient memorial to validate the transfer. [*Tindal* C. J. The register merely gives the name and addition; the memorial would state the nature of the transaction. The act speaks of the memorial and of the entry in the register as distinct matters. The book containing the memorial is referred to as a distinct book.] There is nothing to prevent the company from making up a new register. [*Tindal* C. J. It was rather a careless act on the part of the railway company to make the call before the register had been completed.]

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On a subsequent day *Bompas* Serjt. was heard in *April 22.* support of the rule. This action is brought by the company, who have the transfer book in their custody, if any such book exists. The meaning of the 155th section is, that however the conveyance may operate, as between the parties, it shall not operate, as between the company and the parties, until the formalities pointed out by the statute have been complied with. There is a great difference between the interest passing, as between the parties, and its passing as against the company. As between the parties, there appears to be no necessity that the transfer should be by deed. It must be in writing, duly stamped, and it may be by deed. Upon the execution of the deed by *Flood*, the property in the shares, which that deed purported to convey, vested in *Howell*. If the deed was executed

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by *Flood* under a mistake, it lay upon the plaintiffs to shew that it had been so executed. But of this no evidence was given.

The objection to the calls goes to the whole cause of action. The 146th section, in directing in what manner the calls shall be made by the directors, and before the notice is spoken of, directs that an interval of three calendar months, at the least, shall always elapse between the day appointed for the payment of one call, and the day appointed for the payment of the next succeeding call. This direction evidently requires that the day of payment shall be fixed in the resolution authorising the calls. The directors, at the time of passing the resolution, must be able to see that three months will intervene between the calls. [*Erskine J.* Though the time is alluded to in the early part of the section, no time is directed to be appointed until you come to the notice.] The time in the notice is fixed not by the directors, but by the secretary. The appointment of the time must be by the authority of the directors; the case of the *Great North of England Railway Company v. Biddulph (a)* is not an authority upon this point. In a part of the judgment in that case, which follows the words cited on the other side, the court observed that, at the time, no objection was taken to the want of authority in the secretary. It would therefore be considered as proved or admitted that the secretary was duly authorised. Here, no authority whatever was shewn. [*Bramwell.* The 173d section requires that all notices directed to be given at any general or special meeting of the proprietors, and not otherwise provided for, shall be signed by the chairman or deputy chairman, and shall be given by advertisement inserted in one or more *London and Brighton*

(a) 7 *M. & W.* 243., *supra*, 687.

newspapers. Here, the notices of the calls were signed by the chairman.] The 173d section has no reference to the subject of calls, which the chairman and deputy chairman have no power to make. Nor was any signature of either proved. [*Tindal* C. J. The objection would have been that the advertisements were without authority. But no objection was taken to the advertisements on the ground of want of authority. In order to let in the defendant to take that objection, he should have called upon the plaintiffs to produce the original authority under which the notices were advertised. *Coltman* J. It is sufficient to prove that a call was made, and that notice of that call was advertised in the newspaper pointed out by the act. *Tindal* C. J. This is a mere ministerial act. The objection that the secretary had no authority to insert the time of payment in the notice, comes under a different head, and goes to part only of the plaintiffs' demand.] The objection is, that neither time nor place of payment are fixed by the resolution, or by any other act authorized by the directors.

Cowling on the same side. The calls were not duly made. It is not contended that it is necessary that the time and place of payment should appear in the resolution, but it is submitted with confidence that the time and place mentioned in the advertisement must be inserted under an authority from the directors. This applies to both calls. The office of secretary does not impart any authority. The secretary of a company is merely the *scribe* of the company. The proprietors are a fluctuating body, and it is important that the forms prescribed by the statute should be adhered to. The place of payment should be appointed in the resolution for making the call; the omission would be attended

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with much inconvenience. The 146th and the 148th sections have been referred to on the part of the plaintiffs, but no mention has been made of the 144th section, which provides that the several holders of shares in, or parties who have subscribed to, the said several lines of railway, as hereinbefore mentioned, or who shall hereafter subscribe for or towards the said undertaking, and who shall not be released, or whose shares shall not be forfeited under the provisions of this act, shall, and they are hereby required to, pay the respective sums of money by them respectively subscribed for, or due upon, such shares, or such parts or proportions thereof, and at such times and places as shall from time to time be called for by the directors of the said company, under and by virtue of the powers of this act, and in case any party shall refuse or neglect to pay the money so due or subscribed for, or the part thereof so called for at the time, and in the manner required for that purpose, it shall be lawful for the said company to sue for, and recover the same in any court of law or equity, together with interest on such unpaid sum of money, at the rate of 5*l.* per centum per annum, from the time when the same shall have been directed to be paid by the said directors as aforesaid.

The 146th section merely prescribes the course to be observed by the directors in making calls, and the words “appointed as aforesaid” relied on by the plaintiffs, refer to appointments by the directors. This appears from the fact that the mode and circumstances in which calls are to be made are left to the directors, in that part of the section which precedes the direction with respect to advertising. Though it may not perhaps be necessary that the time of payment should be inserted in the resolution for making the call, there must be, in some form or other, a distinct authority, from the directors to the secretary, with regard to the

time of payment, in order to render the advertisement binding upon those who were liable to such call. It is said, that the 148th section (a) relieved the plaintiffs from the necessity of shewing that any such authority was given. But that section speaks of calls *duly* made, and the objection is, that these calls are not shewn to have been *duly* made. This is no less necessary than proof of the act of bankruptcy in actions by assignees. It could not, for a moment, be contended that such a call was *duly* made, if the resolution were to authorize the secretary to ascertain how much money was wanted and to make the calls accordingly. The time of payment is of equal importance with the amount.

By the 184th section "the directors for the time being of the said company shall superintend all the affairs thereof, and have the custody of the common seal of the said company, with power to use the same on their behalf; and shall have full power and authority to do all acts whatsoever for carrying into effect the purposes of this act, and for the management, regulation, and direction of the affairs of the said company, or relative thereto, which the said company are by this act authorized to do, except such as are herein required, and directed, to be done at some general or special general, meeting of the said company." "And the said directors shall keep a regular minute and entry of their proceedings at every meeting of the said directors, and from time to time make a report thereof to the half-yearly general meetings and to the special general meetings of the said company (if required by any of such meetings), and shall obey their orders and directions."

With respect to the 173d section, which has been

(a) *Supra*, 683.

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referred to, it is sufficient to say that it relates to a different matter. But supposing that section to be applicable to the case of calls, still the plaintiffs would have failed to prove that the advertisements are copied from any notice signed by the chairman or deputy chairman. The plaintiffs might have given in evidence the original notice from the books. Whether the book directed to be kept by the 142d section was produced at the trial, and which was the subject of contradiction when this rule first came before the court, will be decided by the court upon the affidavits, which both sides have filed in consequence of the direction which the court gave on that occasion.

With respect to the memorial, it was incumbent on the plaintiffs to shew a *legal* transfer; and this could not be shewn unless it appeared that a proper memorial had been entered in the book directed to be kept for that purpose. The language of the 155th section is distinct and unequivocal, — “until such memorial shall have been made and entered, as before directed, the seller of such share shall remain liable for all future calls, and the purchaser shall have no share or part of the profits of the undertaking, nor any interest in respect of such share, paid to him, nor any vote in respect thereof, as a proprietor of the said undertaking.” As between the company and the parties, therefore, the transfer is an absolute nullity until the deed is duly memorialised.

As to the argument founded upon the statement, that the entry of the memorial was indorsed on the deed which was produced, the answer is, that the deed was read merely to prove that a conveyance, purporting to be a transfer, had been executed by a shareholder in favour of the defendant. It was not shewn that the indorsement was in the handwriting of the secretary, nor was it read at the trial. This is not like the case of *Kin-*

nersley v. Orpe (a), where a known public officer was authorized to do a particular act, and required to return the instrument to the party with a certificate indorsed thereupon, testifying that the act had been done. Here, on the contrary, the deed is to be kept by the officer of the company, and the indorsement is merely a private memorandum. Upon this part of the case, two cases may be adverted to; *Appleton v. Braybrook* (b), and *Doe dem. Williams v. Lloyd*. (c) In the former of these cases, *Abbott C. J.* says (d), "I hesitated at one time, whether, by analogy to the chirograph of a fine, and the inrolment of deeds, we might not also, in order to avoid the expense of examined copies, consider these as made by the officer who is in the habit of delivering out copies of judgments, and which are received, as evidence, in the courts in *Jamaica*; but, upon further reflection, I think the analogy does not hold; for supposing it had appeared, which it does not, that the officer was of the description above mentioned, still, in the case of a fine, the chirograph is *delivered out as part of the title* of the person applying, by an officer *specially entrusted for that purpose*. But we do not allow to our own officers, who have the mere custody of the records, to verify them; and I do not see why we should allow more to the officers of a foreign court."

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Here, the deed is not to be delivered out but kept by

(a) 1 *Dougl.* 56., *supra*, 689.

(b) 6 *M. & S.* 34.

(c) *Antè*, Vol. I. p. 671.; 1 *Scott, N. R.* 505.

(d) 6 *M. & S.* 37. In *Black v. Lord Braybrook*, *ib.* 39. the copy of the *Jamaica* judgment was produced, and was shewn to be in the handwriting of a person who acted for the

principal clerk of the supreme court of *Jamaica*, and was in the habit of signing official documents. But the court, after hearing *Jervis* and *Erskine*, who relied on this difference, and cited 9 *Mod.* 66. (an anonymous case relating to an exemplification of a sentence in a court in *Holland*), adhered to their former judgment.

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the company. In *Doe dem. Williams v. Lloyd* (a), this court held as the court of K. B. had done in the case of *Appleton v. Braybrooke*, that the indorsement was evidence in those cases only where a usage existed to make such indorsement, and to give out the instrument so indorsed.

It might in many cases be inconvenient to require the attendance of a public officer as a witness to prove the performance by him of a ministerial and formal act. Here, the party is required to make and enter a memorial as clerk to a private company.

In answer to the objection founded upon the stamp act, it is said that the deed remained *in fieri* until the deed was executed by both seller and purchaser; and *Hibblewhite v. M^r Morine* (b) was cited: but that case is totally unlike the present.

In *Hibblewhite v. M^r Morine* it was held that nothing passed by the execution by the vendor of a deed in which the name of the purchaser was left in blank. [*Tindal* C. J. That was a conveyance to nobody. There was no authority to insert the name of the purchaser. (c)] In this case it must be contended that the conveyance remains *in fieri* until the deed is inrolled. It may appear to be unnecessary to cite authorities upon this part of the case: *Hill v. Patten* (d) appears to

(a) *Antè*, Vol. I. 685., 1 *Scott, N. R.* 523.

(b) 6 *M. & W.* 200.

(c) It appears to have been assumed in that case that an authority under seal, to insert the name of any person who might become the purchaser, would have been sufficient. *Tamen quære*.

(d) 8 *East*, 373. *Hill*, the plaintiff, having become bankrupt, an action was brought by

his assignees, in which second action the policy was declared upon in its original form, as containing an assurance *on ship and outfit*; but Lord *Ellenborough* held the instrument to be altogether invalidated; *French v. Patten*, 1 *Campb.* 72. And the court discharged a rule for a new trial. *Ibid.* 180 b., 9 *East*, 378. And see *Fairlie v. Christie*, *Holt, N. P. C.* 331., 7 *Taunt.* 416., 1 *B. Moore*, 114.

be directly in point. In that case it was held that the assured could not, without a new stamp, recover as upon an assurance *on ship and goods*, the policy having at the time it was subscribed by the defendant, contained an assurance *on ship and outfit*, the alteration having been made after the risk attached, though by consent of all parties. Then it is said, that here the deed was incomplete until executed by the vendee. This is not so as far as the vendor is concerned: the conveyance is complete when the deed is executed by him. (a) The execution by the vendee is required only for the purpose of enabling the company to know who is the proprietor. The vendor has previously passed his interest. He could not maintain an action of trover against the vendee, although the latter had not executed. *Jones v. Jones* (b) is no authority to shew that

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(a) Upon the execution of a deed, or other conveyance, by which any estate or interest is expressed to be passed from the party executing to another, the estate or interest vests immediately in the latter, whether conusant of the transaction or not; and it remains in him until disagreement or disclaimer. This disagreement or disclaimer may be by word of mouth, except where the estate or interest is a freehold passing by livery of seisin, grant, devise, or matter of record, (*vide supra*, 691 n.) in which case the disagreement or disclaimer should be in a court of record, the solemnity and publicity of the proceedings in which, countervail livery of seisin and conveyance by matter of record. This disclaimer may be made in any action in which the party against whom the conveyance is sought to be used, is either plaintiff or defendant; and it

is generally for his benefit not to be under the necessity of electing, to accept or reject the interest conveyed, at any earlier period. But where property is sold, it becomes important to know in whom the interest is permanently vested. To obviate the difficulty of the title remaining in abeyance and unmarketable until action brought, conveyancers have introduced a disclaimer *by deed*; which device was upheld by the court of King's Bench, in *Townson v. Tickell*, 3 B. & Ald. 31., upon the authority of the judgment in *Thompson v. Leach*, 2 Ventris, 198., which had been reversed in the House of Lords; and of the case of *Bonifaut v. Greenfield*, Cro. El. 80., which turned wholly upon the construction of the special language of a particular act of parliament. See 4 Mann. & Ryl. 190.

(b) *Supra*, 689.

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none of them ; and when it is considered that the 148th section provides that, on the trial of the action, it shall only be necessary to prove that the defendant was the proprietor, and that such calls had been made, without proving the appointment of the directors or any other matter whatever, we think it must be wholly unnecessary to shew that the original resolution contained either the place or time of payment. As to the argument, that the secretary is not shewn to have authority to make the publication, we think that such authority from the directors must be presumed for an act obviously within the scope of his duty, or that, at all events, they adopted the act, unless the contrary be shewn.

With respect to the second objection, — the want of proof that the defendant was the holder of forty-five shares, — the first ground is, that the evidence required by the 148th section was not brought forward at the trial. By that section, the plaintiffs are enabled to make a *prima facie* case of ownership against the defendant, by the production, at the trial, of the books in which the company are directed to enter and keep, respectively, the names and additions of the several proprietors of shares in the said undertaking, with the number of shares they are respectively entitled to, and an account of the names and places of abode of the several persons who shall, from time to time, be entitled to shares in the said undertaking; the former of which books is directed to be kept by the 140th section, and the latter, by the 142d.

The first question therefore is, whether, in point of fact, both these books were produced and brought forward to the notice of the judge and the jury at the trial of the cause. The plaintiffs contend that they were; and the defendant denies the fact; and we have come to the conclusion upon this point, — upon reference to the notes of the judge at the trial, and the affidavits

which have been furnished on both sides that the book directed to be kept by the 142d section, was *not* in evidence at the trial.

In order, therefore, to prove the proprietorship of the shares, it becomes necessary for the plaintiffs to stand upon the direct evidence which has been furnished on both sides,—that the book they offered at the trial, of the transfer of the shares to the defendant, as to which point a distinction is taken by the defendant between the thirty shares transferred to him by *Flood* under the deed of transfer of the 12th of *February* 1838, and the fifteen shares transferred to him by *Buckingham* under the deed of transfer of the 27th of the same month. With respect to the first transfer, it is contended, on the part of the defendant, that the deed, upon the face of it, has been altered, by substituting the name of the defendant in the place of that of the original transferee, and is therefore void for want of a new stamp. The answer attempted to be given to this objection is, that the insertion of the original name was made by mistake, and that whilst the matter was still *in fieri*, the seller had a right to correct such mistake, by inserting the name of the real purchaser. But we are of opinion that, admitting such alteration might have been made, without destroying the validity of the instrument, under such an assumed state of facts, yet it was incumbent upon the plaintiffs, who produced, and relied upon, the deed, in its altered shape, to shew the circumstances under which the alteration had been made, and that such a state of facts had really existed; for we think that the deed could have an operation at common law, independently of any effect to be given to it by the execution of the purchaser, under the 155th section; and that the power of the stamp would be exhausted by such operation of the deed at common law; and as to the argument that

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the memorial inrolled on a transfer proves conclusively the ownership, we think that if it appear to be an unstamped deed on its production, any further matter therein stated by the secretary cannot give validity or efficacy to the transfer. We are therefore of opinion that the plaintiffs have failed in proving that the defendant was the proprietor of the thirty shares at the time the respective calls were made.

With respect to the fifteen shares purchased from *Buckingham* on the 27th of *February*, the transfer appears however to be free from any objection : for as to the argument that, under the 155th section, no such deed of transfer can convey any interest to the purchaser until after the memorial thereof has been entered in a book to be kept for that purpose by the company, or the secretary, or clerk, we consider the provisions of that section to be intended only for the security of the company, and not as effecting any alteration in the common-law operation of the deed ; namely, that until the deed is inrolled and entered, the company may compel the seller to pay all the future calls, and that the company may be safe in paying any profits to the seller ; but that if the company have possession of the deed of transfer, — as they had in the present case, — there is nothing to prevent them from treating the transferee as the proprietor of the shares, under the legal effect of the deed.

Upon the whole, we think that the plaintiffs are entitled to recover the amount of the two calls on the fifteen shares and the interest thereon, and to that extent only ; and that the rule for reducing the verdict to that sum (a) should be made absolute.

Rule absolute accordingly.

(a) *Vide, supra*, 675 (b).

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COVENANT, for the non-payment of two several sums of 40*l.* 8*s.* 3*d.*, being the amount of two quarters of a year's rent for certain premises demised by indenture bearing date the 24th of *February* 1829, and which sums became due, respectively, on the 24th of *June*, and 29th of *September*, 1839.

The declaration set out the covenants for payment of rent and taxes, as hereinafter mentioned, assigning for breaches of the former — first, the non-payment of 40*l.* 8*s.* 3*d.*, which became due on the 24th of *June* 1839; secondly, the non-payment of a similar amount, which became due on the 29th of *September* in the same year.

Plea: As to the non-payment of all the moneys in the declaration mentioned, except 18*s.* 6*d.*, parcel of the second sum of 40*l.* 8*s.* 3*d.*, a set-off for money paid by the plaintiffs for the use of the defendant, and for money due from the plaintiffs to the defendant upon an account stated; and as to the non-payment of the 18*s.* 6*d.*, payment of that amount into court.

The plaintiffs, by their replication, traversed the set-off, and took the 18*s.* 6*d.* out of court, in satisfaction of that part of the demand in respect of which it was paid in.

The following case was, under a judge's order, made pursuant to the provisions of the 3 & 4 *W. 4. c. 42. s. 25.*, stated for the opinion of the court.

By indenture, bearing date the 5th of *February* 1801, the plaintiffs demised to one *George Taylor* two houses, being Nos. 10. and 11. in *Great Distaff Lane* in the city of *London*, for a term of twenty-eight years from *Christ-*

A lessee covenanted "to pay all parliamentary, parochial, and other taxes, tithes, and assessments, then, or thereafter to be, issuing out of all or any of the demised premises, or chargeable upon the landlords or tenants thereof, for the time being, in respect thereof." Held, that a rent-charge, imposed on the premises in lieu of the land-tax, which had been purchased by a former tenant of the premises under the provisions of the 42 *G. 3. c. 116.*, was a parliamentary tax or assessment, within the meaning of the covenant.

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mas 1799, at the yearly rent of 54*l.* 8*s.* That lease contained a covenant on the part of *George Taylor*, for himself, his executors, and administrators, to pay all parliamentary, parochial, and other taxes, tithes, and assessments then, or thereafter to be, issuing out of all or any of the premises thereby demised, or payable by the landlords or tenants thereof, for the time being, in respect thereof (except land-tax on account of the sum of 21*l.* 13*s.* 4*d.*, which was the rent payable for the demised premises in 1693).

George Taylor afterwards assigned the premises to *William Mathie*, his executors, &c., for all the then residue of the term granted by the lease.

After the assignment, and during the continuance of the lease, namely, on the 3d of *May* 1805, *William Mathie* entered into a contract with the commissioners for the redemption of the land-tax, to redeem the land-tax charged on Nos. 10. and 11., the amount of the assessment, as stated in the said contract, being 6*l.* 19*s.*, and the amount of the money to be paid as the consideration for such redemption, being 254*l.* 16*s.* 8*d.* 3 per cent. consolidated Bank annuities; which sum was duly transferred by the said *William Mathie*; and the redemption of the land-tax, chargeable on the last-mentioned premises, was duly perfected.

By indenture, bearing date the 24th of *February* 1829, the plaintiffs demised the aforesaid premises, and also another house, being No. 9. in *Great Distaff Lane* aforesaid, to the defendant *Robert Harrild*, for the term of twenty-eight years, commencing from *Christmas-day* 1827, at the yearly rent of 161*l.* 13*s.*, payable by the defendant to the plaintiffs, quarterly, on *Lady-day*, *Midsummer-day*, *Michaelmas-day*, and *Christmas-day* in every year, at the counting-house in *Christ's Hospital*.

And by the last-mentioned indenture the defendant covenanted with the plaintiffs, amongst other things, to pay the said yearly rent on the days and at the place

thereinbefore mentioned, and also, at his own charge, to pay all parliamentary, parochial, and other taxes, tithes, and assessments, then, or thereafter to be, issuing out of all or any the premises thereby demised, or chargeable upon the landlords or tenants thereof, for the time being, in respect thereof.

The said *William Mathie*, who had redeemed the land-tax as above mentioned, died in *December* 1838. His executors having made a claim upon the defendant, under the land-tax redemption act (42 G. 3. c. 116.), for the sum of 79*l.* 18*s.* 6*d.*, being at the rate of 6*l.* 19*s.* per annum from *Christmas-day* 1827 (on which day the first-mentioned lease expired), as due to them in respect of Nos. 10. and 11., in consequence of the said *William Mathie* having redeemed the land-tax thereon as afore-said, the defendant paid the same under a distress regularly levied of his goods upon the premises, before the commencement of this action, viz. on the 12th of *August* 1839, and claimed to set off the same in this action against the said arrears of rent. (a)

Before the distress and payment above mentioned, the defendant, having communicated the claim made by *Mathie's* executors, to the plaintiffs, — to whom he referred them for payment of their demand, — received from the plaintiffs' attorney the following letter : —

“ *April* 6th, 1839.

“ Sir, — I trouble you, in consequence of an application which has been made to the Governors of *Christ's Hospital* for payment of 76*l.* 9*s.*, being eleven years' land-tax accrued on the houses rented by you of the Governors. The claimants are the representatives of Mr. *Mathie*, who having, long before this period, redeemed the land-tax, stood in the place of the government. Having neglected to demand the land-tax from

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(a) *Vide Sapsford v. Fletcher*, 4 T. R. 511. *post*, 720 (a).

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year to year, they now claim the arrears from the period of the commencement of your tenancy. Considering that the Governors of *Christ's Hospital* are not the parties upon whom this claim can be made, I have taken an opinion of counsel how this may be, and I find that you, as tenant of the premises, are the only person upon whom the claim can be made, and that it is in the power of the claimants to recover the amount against you by action at law, or, if they prefer it, by distress on the premises. I think it is proper to apprise you of this, lest you should be inclined to consider yourself not liable, and should, by refusing to pay, subject yourself to the trouble, inconvenience, and expense of a distress."

The claim of the executors of *Mathie* was at first confined to the arrears of the land-tax thus redeemed by their testator, for six years next preceding their claim. But they afterwards insisted on being paid the arrears for the whole period from the expiration of the first-mentioned lease, and intimated their intention to distrain for such arrears unless the same were paid.

All this was, before the distress and payment above mentioned, communicated to the plaintiffs, who, through their attorney, in answer, addressed to the defendant's attorneys the following letters: —

" July 8th, 1839.

" Gentlemen, — I have already taken an opinion, and am told that *Christ's Hospital* are not liable to allow to Mr. *Harrild* the land-tax which he may be obliged to pay to Mr. *Mathie's* executors. You, I understand, have taken an opinion also, and are told that *Christ's Hospital* are liable. Upon this I propose to refer the matter to a third counsel, named between us, and to abide by his decision. To this you reply that you will abide by this third decision if it be in your favour; but if it be against you, you reserve an option to abide by it or

not, as you may think fit. This, I believe, is the present state of the matter. I cannot consent to go to a reference in this manner. I have already said, and I beg to repeat in writing, that my clients do not deny the right of Mr. *Mathie's* executors to distrain for his demand,—indeed, I believe we both agree in this,—and that the sole question is between the landlords and the present tenant,—*Christ's Hospital* and Mr. *Harrild*. I therefore beg to give notice to you, on behalf of my clients, that I shall, in the event of their liability being established, object to pay any costs whatever incurred by Mr. *Harrild* in resisting the claim of Mr. *Mathie's* executors, whether in the shape of broker's poundage on a distress, or in defending any action, or in replevying, or in any other way. I also beg to say that I still am ready to submit to a reference, provided it be (as is ever customary) made obligatory on both parties."

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"August 12th, 1839.

"Gentlemen,—My own opinion is, and I am also advised, that the claimant for arrear of redeemed land-tax is not confined, by the statute of limitations, to six years past, but can recover, by distress on the premises, the whole arrear from *Christmas* 1827, when the lease, under which he occupied, expired. The letter which I wrote to you on the 8th *July*, applies equally to the present demand, therefore, as it did to the demand of six years only. On the part of the landlords, therefore, I do not require you to resist this claim, in order to establish your claim against them, should they be otherwise liable. But I repeat the notice that I there gave you."

The question for the opinion of the court is, whether the payment, so made by the defendant, constituted any defence to the action, or not. If the court shall be of opinion, that the said payment constituted a de-

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fence to the action, judgment of *nolle prosequi* (a) is to be entered immediately after the decision of the court. But if the court shall be of opinion that the said payment did not constitute any defence to the action, the defendant is to withdraw his plea of set-off, and judgment is to be entered against him, by confession, for 79*l.* 18*s.* and costs, or such other sum as the court may direct, immediately after such decision.

Peacock for the plaintiffs. The question is, whether the sum paid to the executors of *Mathie*, falls within the defendant's covenant, whereby he undertook to pay "all parliamentary, parochial, and other taxes, tithes, and assessments, then, or thereafter to be, issuing out of all or any of the premises thereby demised, or chargeable upon the landlords or tenants thereof, for the time being, in respect thereof." There can be no doubt that if this had been a demand for land-tax, *eo nomine*, the defendant would have been bound to pay it under his covenant; and it is submitted, that this claim stands precisely upon the same footing. By the 42 G. 3. c. 116., consolidating the acts relating to the redemption or sale of the land-tax, it is enacted (s. 154.),—with reference to a purchase by a stranger,—that "the manors, messuages, and lands, tenements, or hereditaments, the land-tax whereof shall be so purchased, shall be wholly *freed and exonerated from such land-tax, and all further assessments thereof*, and all claims of His Majesty, His heirs, and successors, in respect of the same, from the like periods as are herein (s. 38.) directed in cases of redemption of land-tax; *but the respective purchasers of such land-tax*, and their heirs, successors, and assigns, shall, from such period of exoneration, *be entitled to demand, have, and receive* for their, his, or her own use, for ever, and shall, be ad-

(a) A *nolle prosequi* to the whole action is a *retraxit*.

judged &c., to be in the actual seisin and possession of a *yearly rent or sum, as a fee-farm rent (a), equal in amount to the land-tax so purchased*, free of all charges and deductions, to be issuing and payable out of the manors, messuages, &c. whereon the land-tax so purchased was charged, on the same days as such land-tax was payable at the time of the purchase thereof; and such respective purchasers, their heirs, successors, and assigns, shall have priority of security on such manors, messuages, &c., in respect of such annual sum or rent, over every other incumbrance thereon, and shall have and enjoy all such powers, remedies, benefits, and advantages, for the recovery thereof, whether by action, suit, *distress*, or otherwise, as landlords, by law, have, or can enjoy, for the recovery of rents reserved on leases."

The rent, thus imposed in lieu of land-tax, is clearly a parliamentary tax or assessment, within the meaning of the covenant. The object of the statute was, to leave landlords and tenants in the relative situation with respect to the land-tax in which they previously stood. There was no intention to relieve tenants from any liability to which they had subjected themselves in their

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(a) The term "fee-farm rent" appears to be here used instead of "rent-charge." A fee-farm rent is a rent-service reserved upon a feoffment in fee, where, by the terms of the feoffment, the feoffee is to hold of the feoffor; and it is commonly reserved upon grants by the crown. But it has been said, that since the statutes of *quia emptores* and *de prerogativa regis*, there can be no feoffment by a subject, to hold of the feoffor, and, therefore, no new manor created, except with the consent of all lords, mediate and immediate. But the restriction in the former statute

is confined to feoffments by sub-tenants, and that in the latter to feoffments by tenants in chief (*immediate tenants*), of the crown *by knight's service*. There appears, therefore, to be nothing to prevent a person holding, as is now the ordinary tenure, immediately of the crown in *socage*, from making subinfeoffments, and thereby creating a manor, to which a court-baron will be necessarily incident. *Vide 5 Mann. & Ryl. 156, 157., 2 N. & M. 779 n., 6 N. & M. 499 n.; Gilbert de Humfraville's case, 1 Rot. Parl. 54 a.*

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leases. This is clearly shewn by the 158th section, which applies only to tenants who were not under any covenant to pay the land-tax. By that clause it is enacted that, "where the land-tax, charged on any manors, messuages, lands, tenements, or hereditaments which are, or shall be, leased or demised, at a rack rent, for any term or number of years, or from year to year, or at will, shall be purchased by any tenant or lessee thereof, *who shall not be bound by any covenant or agreement to pay the land-tax* during the continuance of the demise, it shall be lawful for such tenant or lessee to retain out of the rent reserved, or made payable on such lease or demise, during the continuance thereof, the amount of the land-tax so purchased, and the payment or tender of the residue of such rent shall be as valid and effectual to discharge such tenant or lessee, as the payment or tender of the whole rent reserved on such lease would have been in case such land-tax had not been purchased." *Mathie*, having bought the land-tax while he was tenant of the premises, and under covenant to pay it, could not have deducted it from his rent under the above provision; neither could the present defendant have made the deduction, had he been the party effecting the purchase. If that be so, he can have no right to deduct the amount, merely because the land-tax was purchased by a stranger. [*Erskine J.* Is there any provision in the statute applicable to the case of a purchase of the land-tax by a landlord, while there is an existing lease under which his tenant has covenanted to pay it?] That case is provided for by the 126th section, which enacts, that the amount of the land-tax, so redeemed by the *landlord*, shall, during the continuance of the lease, be considered as rent reserved thereon, and be payable and recoverable in like manner. There is a clear distinction between a redemption of the land-tax by the owner of the property, and a purchase

of it by a stranger. On a redemption by the owner, the land is altogether freed from the tax, but on a purchase by a stranger the land is subjected to a parliamentary assessment in the shape, or by the name, of a fee-farm rent. The circumstance of its being reserved in such a form does not make it the less a tax.

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Stephen Serjt., for the defendant. There is not any essential distinction between the purchase and the redemption of land-tax. Assuming the contract by *Mathie* with the commissioners to have been a purchase, it is submitted that the defendant is not bound to pay this rent-charge under his covenant. The statute points out two courses of proceeding. By s. 10, all persons having any estate or interest in any manors, &c., whereon any land-tax shall be charged (except tenants at rack rent, &c.), are authorised to contract for the redemption of such land-tax; and by sects. 18, 19, & 20, parties entitled in possession, or in reversion, to the rents and profits, have a preference given to them until the 24th *June* 1803. The thirty-eighth section provides that on payment of the consideration for such redemption, "the manors, messuages, lands, tenements, and hereditaments, or other property comprised in such contract, shall be *wholly freed and exonerated from the land-tax charged thereon, and from all further assessments thereof*, from such of the quarterly days of land-tax as shall next precede the day of the transfer or payment of such consideration, or the first instalment thereof; provided the certificate of the contract shall be duly registered, pursuant to the directions of this act."

The effect of the redemption therefore is, that the land-tax ceases to exist *as a tax*. The 123d section, which secures to the party redeeming the benefit of the redemption, enacts, that where a party having a limited interest in any land shall redeem the land-tax out of

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his own property, such lands shall become chargeable, for the benefit of such party and his "executors, administrators, and assigns," with the amount paid as the consideration for the redemption of such land-tax, and with the payment of a yearly sum by way of interest, equal to the amount of the land-tax redeemed; thus making the rent-charge transmissible to the personal representatives of such party. The clauses relating to the purchase of the land-tax by strangers, are the 151st and the 154th. By the former, where the land-tax shall not have been redeemed within the prescribed period by the parties entitled to preference, the commissioners may contract for the sale of it to other persons. And upon the registry of such contracts, the 154th section, using the very same words as are contained in the 38th clause, provides that "the manors, &c. the land-tax whereof shall be so purchased, *shall be wholly freed and exonerated from such land-tax*, and all further assessments thereof," &c.; and the purchaser is declared to be entitled to a fee-farm rent transmissible to his heirs. Therefore, whether the land-tax is redeemed or purchased, it is in either case *extinguished*. The question then is, whether, as regards the defendant's covenant, this rent-charge is to be taken as equivalent to the land-tax itself. The fact of the land-tax having been purchased by *Mathie* must have been known to the plaintiffs when they granted the lease to the defendant; but it would not be known to the latter, who, on inquiring as to the amount of *taxes* paid in respect of the property, would hear nothing of the present claim. If the plaintiffs had intended to make the defendant liable to pay it, they would have taken care to frame the covenant accordingly. According to the rule of construing words by their associates, the terms "taxes, tithes, and assessments," must refer to *public* burthens, and not to private claims. By the act not only is the land-tax to cease,

but all assessments in respect thereof. The fee-farm rent substituted for the land-tax is a mere private security. In *Ward v. Const* (a), where the owner of a house, in consideration of a premium, demised it at one third of its annual value (the lease containing no stipulations respecting taxes or rates of any description), and afterwards redeemed the land-tax, it was held that he was entitled to receive from the tenant an annual payment equal to two thirds of the land-tax so redeemed. That case is an authority to shew that the land-tax is a charge upon the party beneficially entitled to the property. It may probably be contended that even although the defendant was not liable under his covenant to pay this demand, he could not set it off in the present action; but *Hyde v. Hill* (b) shews that such a payment may be made the subject of a plea of set-off.

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Peacock in reply. Although, perhaps, a technical objection might be taken to the pleading of the payment in question as a *set-off*, the plaintiffs have no wish to avail themselves of such a point. The question is, whether this is a parliamentary tax. It is impossible to contend that an annual payment imposed by act of parliament, is a mere private charge. It may still be a public tax or assessment, although payable to a private individual. *Ward v. Const* is an authority in favour of the plaintiffs. In *Waller v. Andrews* (c), where, by a memorandum of agreement, certain marsh lands were demised by the plaintiff to the defendant, subject to a condition that the defendant should pay all outgoings whatsoever, rates, taxes, scots, &c., whether parochial or parliamentary, which then were or should be thereafter charged or chargeable upon or on account of the

(a) 10 B. & C. 635., 5 Mann.
 & R. 402.

(b) 3 T. R. 377.
 (c) 3 M. & W. 312.

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said marsh lands (the then present land-tax only excepted); it was held, that any extraordinary assessment made by commissioners of sewers upon the lands, for a work of permanent benefit to the land, was within the meaning of the agreement.

The 154th section does not say that the lands shall be free from all taxes or charges, but merely that they shall be free from the *land-tax*.

TINDAL C. J. The question in this case is, what was the intention of these parties, as expressed in this covenant. The words are, that the lessee shall pay "all parliamentary, parochial, and other taxes, tithes, assessments, then, or thereafter to be, issuing out of all or any the said thereby demised premises, or chargeable upon the landlords or tenants thereof, for the time being, in respect thereof." If the land-tax had not been redeemed, there could not be any doubt that the defendant would have been bound to pay it. When purchased by *Mathie*, a rent-charge was imposed in lieu of such land-tax. It must be taken that the parties, when the lease was made to the defendant, intended that the rent-charge should stand upon the same footing as the land-tax, provided that the words which they have used will admit of such a construction. When we find a fee-farm rent, corresponding in amount with the land-tax, imposed on the premises by the legislature, it seems to me that we do no violence to the language of the covenant, by holding this fee-farm rent to be a parliamentary assessment issuing out of such premises. I therefore think that the payment in question was one which the defendant was bound to make, under his covenant.

BOSANQUET J. I am of the same opinion. The rent-charge payable to the representatives of *Mathie*

did not originate in any private grant or agreement, but was created by authority of parliament, in substitution for an equivalent amount of land-tax which was abolished. Under the statute, the land-tax might either be redeemed by the owner of the land or purchased by a stranger. Here, it was purchased by one, who, at the time, was the tenant of the property. During the remainder of his tenancy, he would hold the premises free both from the land-tax and the substituted rent-charge. After the expiration of his tenancy, a lease was granted of the premises to the defendant, who covenanted to pay all parliamentary taxes and assessments, then, or thereafter to be, issuing out of the premises, or payable by the landlords or tenants in respect thereof. At the time when this lease was granted, there was a person who was entitled by authority of parliament to a fee-farm rent out of the premises, not acquired by purchase from the owners of the property, but derived from the legislature, who empowered him to receive such rent in lieu of the land-tax charged thereon. I cannot entertain a doubt that this rent-charge falls within the meaning of the defendant's covenant.

COLTMAN J. Although the expressions used in this covenant are open to some doubt, and this rent-charge may not be a *parliamentary tax* in the *strict* sense of the words, yet it seems to me that this is a *parliamentary assessment*, according to the fair construction of the language employed by the parties.

ERSKINE J. The parties certainly might have placed this question beyond doubt, by adding to the covenant the words, "or any rent-charge payable in lieu thereof." But when we look at the statute, and at all the circumstances of the case, it is only fair to presume that the parties intended to include within the covenant

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entered into by the defendants, the rent-charge substituted for the land-tax. By the 124th section of the statute, tenants, who, by their agreements, were bound to pay the land-tax, are subjected, on its redemption by their landlords, to pay an equivalent amount, during the continuance of their leases, as an additional rent. Although this statute appears to contain no provision applicable to such a case as the present, where the land-tax is purchased by a stranger, it could never be intended that a tenant should, by reason of such a purchase having been made, gain an advantage at the expense of his landlord. The lease to the defendant was made after the purchase of the land-tax by *Mathie*; but it cannot be doubted that the parties meant to place themselves in the same situation as that in which they would have stood if the lease had been granted previously to the land-tax being redeemed or purchased. (a)

As this rent is a charge imposed by the authority of parliament, I think that it may be fairly considered as a parliamentary tax, within the meaning of the covenant in question.

Judgment for the plaintiffs. (b)

(a) *Vide Stubbs v. Parsons*, 3 B. & Ald. 516.; *Fuller v. Abbott*, 4 Taunt. 105.; *Taylor v. Zamira*, 6 Taunt. 524., 2 Marsh. 220.; *Clennell v. Read*, 7 Taunt. 50., 2 Marsh. 371.; *Saunderson v. Hanson*, 3 Carr. & P. 314.; *Dyer v. Bowley*, 2 Bingham. 94., 9 B. Moore, 196.; *Coote, Landlord and Tenant*, 276.

(b) And see *Yaw v. Leman*, 1 Wils. 21.; *Bradbury v. Wright*, 2 Dougl. 624.; *Andrews v. Hancock*, 1 Bro. &

Bingham. 37., 3 B. Moore, 278.; *Whitfield v. Brandwood*, 2 Stark. N. P. C. 440.; *Spragg v. Hammond*, 2 Bro. & Bingham. 59., 4 B. Moore, 431.; *Amfield v. White*, *Ryan & Moody*, 246.; *Warner v. Potchett*, 3 B. & Adol. 921.; *Northwick, ex parte*, 1 Younge & Coll. 166.; *Sherington v. Andrews*, *Comberb.* 483.; *Brewster v. Kidgill*, 12 Mod. 166., 1 Salk. 198., 1 Lord Raym. 317., 5 Mod. 369., *Carthew*, 488., *Lord Holt*, 169.

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A. DAVIDSON, Public Officer of the Commercial Bank of England, v. Sir THOMAS S. M. STANLEY, Bart.

April 17.

ASSUMPSIT, against the defendant as the drawer, payee, and indorser of ten bills of exchange, amounting altogether to 7366*l.* 17*s.* 7*d.*, drawn, and payable, at different periods in the year 1839.

The pleas denied that the bills were drawn or indorsed by the defendant.

At the trial before *Rolfe* B. at the last *Liverpool* assizes, the ten bills were produced, and purported to be drawn and indorsed by "*Robert Blundell*, by procuration of *Thomas S. M. Stanley*. (a)

Blundell, the person representing himself in these instruments as the agent of the defendant, had been his under-steward, but about eleven years ago, seven months after the death of the late head steward, he was promoted to the office of head steward. It was stated and admitted, that since the negotiation of the bills in question

and receipts take place, has no implied authority to pledge the credit of his employer by drawing and indorsing bills of exchange in the name of the latter.

Nor, in the absence of all direct evidence of authority, does the nature of the employment of such a bailiff furnish any ground for inferring the existence of such an authority upon slight, or upon any other than clear and distinct evidence of assent or acquiescence.

To fix the principal the evidence should distinctly shew that he knew, or had the means of knowing, the acts done in his name.

(a) This is the ordinary commercial form of signing by procuration. It is incorrect; as, in strictness, the words used would import that *Blundell* was the drawer &c. of the bills through the procuration, inter-

position, or agency of *Stanley*. The proper mode of signing by procuration is, either to use the name of the principal only, or to sign, "*A. B.* (the principal) by, or by the procuration of, *C. D.*" (the agent).

It is no misdirection if the judge states in strong terms the impression which the evidence has made upon his mind, unless it be clearly shewn that the impression was not warranted by such evidence.

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Blundell had been convicted of embezzling the moneys of his employer, and transported for fourteen years.

The bills were drawn upon and accepted by five persons, one of whom was tenant of the defendant, another his shepherd, and the other three were also servants employed by him, who had, at *Blundell's* request, given their acceptances to *Blundell*, in blank.

There was no proof of any direct authority from the defendant to *Blundell*, either to draw or to indorse bills for him. The circumstances under which it was contended, on the part of the plaintiff, that the jury might infer an authority, were these: —

Several persons who supplied goods for the use of the defendant's establishment were paid, from time to time, in cheques drawn by *Blundell*, at the defendant's mansion at *Hooton Hall*, (where *Blundell* had an office,) upon the Commercial Bank of *England*, with which *Blundell* had an account in his own name, the defendant banking with other bankers. For these payments *Blundell* took credit in his rent-account with the defendant. One of these cheques was shewn to have been drawn in the presence of the defendant. *Blundell*, at various times, beginning in 1837 and ending in 1839, made payments, to a very large amount, to tradespeople who had accounts against the defendant. These persons were paid in promissory notes in the following form: —

"I promise to *A. B.* or order, the sum of £ . on account of Sir *Thomas Stanley*, Bart., as advised.

"*Richard Blundell*, by procuration of Sir *Thos. S. M. Stanley*, Bart. (a)

"To the Royal Bank,

"*Liverpool*,

"Payable at *Robarts, Curtis, and Co.*,

"*Bankers, London.*"

(a) *Vide supra*, 721. (a).

It was not shewn that the defendant ever furnished funds to take up these notes, or that he was aware of their existence.

Two bills were given in evidence by the plaintiff, drawn by one *Weaver*, a tenant of the defendant, who, being in arrear for rent, drew the bills upon his cheese-factor in *London*.

The first of these was a bill for 350*l.*, drawn in 1835 to *Weaver's* own order, and indorsed by him in blank (*a*), and paid to *Blundell* on account of rent. *Blundell* indorsed the bill, as by procuration for the defendant, and paid it into the defendant's bankers. Nothing occurred to shew that the defendant was in any way apprised of the mode in which this bill had been indorsed. It appeared in the pass-book merely as a bill drawn by *Weaver*, and paid in to the credit of the defendant.

The second bill was drawn by *Weaver* to the order of *Blundell*, who indorsed it in his own name, and afterwards indorsed it as per procuration for the defendant. Nothing more appeared respecting this bill, which was not shewn to have reached the defendant, or even to have been paid to his bankers.

A bill was put in by the plaintiff, drawn by one *Gregory* for 26*l.* upon one *Burton*, and indorsed by *Gregory* in blank, and afterwards indorsed by *Blundell* as by procuration for the defendant. This bill was paid in, with others, to the defendant's credit with the bankers, nothing appearing in the pass-book to indicate that this nugatory (*b*) indorsement had been written upon the bill.

A bill was put in by the plaintiff, drawn by the defendant himself in 1836, to this effect:—“ Six weeks

(*a*) After which an indorsement by or for the defendant could answer no purpose.

(*b*) If *Gregory's* bill on *Weaver* had been dishonoured

the amount would have been properly carried to the debit of the defendant's account whether he had indorsed it or not.

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1841. after date pay to me or my order 118*l.*, value received.
 ———
 DAVIDSON . “ To the *Liverpool* Royal Bank.”
 v.
 STANLEY. This bill was indorsed by the defendant, afterwards by *Robert Leatham*, and afterwards by *Blundell* in his own name: Nothing further appeared respecting this bill. (a)

It was shewn, that in 1837 a railway was forming over the defendant's land. In connexion with this circumstance, the defendant opened an account with the Royal Bank at *Liverpool*, and in *October* 1836 he sent to *Blundell* the following letter, addressed to the bank. “ Gentlemen, I have authorised my agent, Mr. *Richard Blundell*, to draw on my account with the Royal Bank 450*l.*, which I engage to repay. I am, &c.”

In *July* 1838 a bill, at seven days' date, for 5000*l.*, and another, at twenty-one days' date, for 10,000*l.*, payable to the defendant's order, were paid into the *Liverpool* bank to the credit of the defendant. These bills were indorsed by *Blundell* as by procuration for the defendant. It was not shewn that the defendant was conscious of the mode in which these bills had been dealt with. (b) The 15,000*l.* was withdrawn from the *Liverpool* bank upon orders and checks given by the defendant.

M'Donald, the manager at *Chester* for the Commercial Bank of *England*, was not called by the plaintiff. It was stated that he had been at *Liverpool* in the morning, and had left the town for *Chester* dur-

(a) This bill would seem to have been put in merely to shew that the defendant was acquainted with the nature of bill transactions.

(b) Such an indorsement could not have prejudiced the defendant, whose credit would be thereby pledged merely for

the purpose of enabling him to acquire credit with the bankers to the same amount. It seems to furnish no ground whatever for inferring that the defendant would authorise *Blundell* to pledge his credit, with or without consideration, to an unlimited extent.

ing the trial. *Wilde*, A. G. applied for a nonsuit on the ground that the plaintiff had not chosen to call the only witness who, in the absence of *Blundell*, could shew whether any authority had been given to *Blundell* which would entitle him to draw and indorse the bills in question. The learned judge was, however, of opinion that there was *some* evidence to go to the jury; whereupon *Wilde*, A. G., without calling witnesses, addressed the jury, and he referred to *Hogg v. Snaith* (a) and *Hay v. Goldsmith* (b) there cited, *Robinson v. Yarrow* (c), *Smith v. Chester* (d), *Murray v. The East India Company* (e), and *Attwood v. Munnings* (g), and commented on the case of *Prescott v. Flynn* (h), which had been cited by *Cresswell* for the plaintiff.

The learned judge in his direction to the jury, told them, that in order to make out that a party is drawer and indorser by the agency of another, it is not necessary to have a written authority, but that it is of the greatest importance that there should be very clear evidence that the agent has authority for what he does with regard to bills: that ordinarily speaking persons receiving such bills would require distinct written or verbal authority, in order that there might be no difficulty afterwards: that a party who transacts business with one who acts in the name of another may always render himself secure by refusing to advance money without distinct proof of the alleged authority: that the authority, however, might be circumstantial only, as where the principal profited by the transaction, or trusted to the agent for reimbursement, or where, though

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(a) 1 *Taunt.* 347.(b) *Ib.* 349.(c) 7 *Taunt.* 455.(d) 1 *T. R.* 654.(e) 5 *B. & Ald.* 204.(g) 7 *B. & C.* 278., 1 *Mann.*& *R.* 66.(h) 9 *Bingh.* 19., 2 *M. & Scott*, 18.

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he derived no advantage from the transaction, he acquiesced in it, but that in such cases the evidence should be extremely clear: that although the defendant's bankers might have had reason to suppose that *Blundell* was using the defendant's name with his authority, that was not equivalent to notice to the defendant himself; and that the defendant was not bound by any thing of which the bankers may have had notice, or which by inquiry they might have fished out. The learned baron went minutely through the evidence, and observed upon the absence of *M'Donald* and the non-production of the pass-book with the Commercial Bank. The jury, which was a special one, consulted together for a few minutes, and then returned a verdict for the defendant.

Stephen Serjt. now moved for a new trial on the ground of misdirection. The situation of *Blundell* was such that very slight evidence of authority ought to have been considered sufficient, and the jury should not have been told, with reference to the facts of the case, that the evidence of authority ought to be extremely clear. *Blundell* had the sole management of the defendant's farm, a concern of such magnitude that 2500 head of cattle, &c., were sold from it in the course of one year. The business of such a farm, as now conducted, would frequently require the drawing and indorsing of bills; and an authority might almost be presumed. At all events very little evidence is required in such a case. The plaintiff was unfortunately unable to call *Blundell* himself, he being under sentence of transportation. [*Tindal* C. J. How came the bank to keep back so long?] The bills were drawn at four months. (a) [*Erskine* J. You are not moving as upon a

(a) Two years seem to have intervened between the falling due of the bills and the commencement of the action.

verdict against evidence, but for misdirection.] It should have been left to the jury to say, whether under the circumstances it was not likely that the defendant knew that his steward was in the habit of indorsing bills in his name. [*Coltman J.* The defendant would not see the bills unless they were returned.] He would see the pass-book, and he would have no right to take it for granted that bills paid in to his, the defendant's, credit were indorsed by *Blundell* in his own name. The learned judge said that the pass-book should have been produced; but, if so, it is submitted that it ought to have been done by the defendant. [*Tindal C. J.* The plaintiff had to make out his case.] The case was left to the jury. [*Erskine J.* If there be a scintilla of evidence the case must go to the jury.] The learned judge said that he could not see any thing in the evidence to shew that the defendant knew that his name was used. [*Tindal C. J.* That was only reasoning upon the facts. *Bosanquet J.* Is a judge merely to read over his notes without saying in what manner the case strikes him?] It is not the duty of a judge to state what is the balance of the evidence. No observation was made on the absence of evidence on the part of the defendant. [*Tindal C. J.* If the case was weak at first, it does not become less so because no answer is given to it.] The bills were discounted by *M'Donald* for *Blundell*. The attorney-general said, that if *M'Donald* had been present he would have been able to state what authority *Blundell* had for drawing and endorsing these bills; and the learned judge told the jury that a material witness had been sent away. It is submitted, that upon the issues in this cause, the evidence of *M'Donald* would have been immaterial. To entitle the defendant to set up fraud, that defence should have been made the subject of a proper plea. The misdirection of the learned judge upon this point

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may have produced an effect upon the jury, and occasioned the verdict from which the plaintiff now seeks to be relieved.

TINDAL C. J. I am of opinion that no ground has been shewn for this motion. I do not perceive that any proposition of law was laid down by the learned judge which was not strictly correct. The whole objection amounts to this, — that the opinion of the judge was delivered in favour of the defendant. I think it is no objection that a judge lets the jury know the impression which the evidence has made upon his own mind. At all events, the party objecting to such a course should shew that the impression entertained by the judge was not justified by the evidence. If bankers could recover upon such a state of facts as was presented to the jury in this case, every farm agent might pledge the credit of his employer to an indefinite amount. Here, there was no direct authority; and the case of *Murray v. The East India Company* establishes that a *general* authority to receive and pay, does not authorise the agent to indorse bills of exchange. Here, it was never shewn that the defendant knew, or had the means of knowing, that his name was used in the manner in which it was used by *Blundell*.

BOSANQUET J. I am quite of the same opinion. I think the verdict was perfectly right. The learned judge considered that there was some *slight* evidence of authority, and that he would not be justified in taking the case upon himself. It seems to me that if a nonsuit had been directed, there must have been a new trial. A judge has a right to state what impression the evidence has produced on his mind.

COLTMAN J. The learned judge seems to have made strong observations; but not stronger than he was

justified in making. A large mass of evidence had been given, which, though of little weight in itself, was of such a nature as might mislead a jury.

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ERSKINE J. There was no misdirection; and if the jury had come to a different conclusion, I think it would have been a verdict against evidence.

Rule refused.

FREDERICK THOMAS WEST, surviving Executor
of JOHN WEST, v. JOHN BLAKEWAY.

April 29.
May 4. |

COVENANT. The declaration stated that the testator, before and at the time of the making of the indenture of demise thereafter mentioned, was lawfully possessed of the tenements by that indenture demised to the defendant, for a certain term of years, that is to say, for the residue of a term of thirty-one years commencing on and from the 24th day of *June* 1812, and which term was then unexpired. That the testator being so possessed, on the 30th of *May* 1818, by a certain indenture then made between the testator of the one part and the defendant of the other part, the A covenant to yield up at the expiration of the term all erections and improvements erected, made, or set up during the term is broken by the removal of the sashes and framework of a greenhouse erected during the term, the framework of which was laid upon walls built for the purpose of receiving it, and embedded in mortar thereon.

A plea to such a breach, that it was agreed between the lessor and the termor, and that the lessor promised the termor, that if the latter would erect, make, and set up a certain erection and improvement, to wit, a greenhouse in and upon the premises during the continuance of the term, he should be at liberty to pull down and remove such greenhouse at the expiration of the term, provided no injury were done to the premises,—that the termor confiding in the agreement and promise did erect &c., and did at the expiration of the term remove such greenhouse, and that no injury or damage was done to the premises, was held to be a bad plea, upon which the plaintiff was entitled to judgment *non obstante veredicto*.

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counterpart (a) of which indenture the plaintiff brought into court (b), sealed with the seal of the defendant, the testator demised to the defendant a certain messuage, with the chaisehouse, outhouses, garden, and field thereto belonging, with the appurtenances particularly described in the indenture, *habendum* to the defendant, his executors, administrators, and assigns from the 25th day of *December* then last past for the term of twenty-one years from thence next ensuing, determinable nevertheless as thereafter mentioned, at and under the yearly rent therein mentioned. And the defendant did, by the said indenture, for himself, his heirs, executors, administrators, and assigns, covenant with the testator *J. West*, his executors, administrators, and assigns (amongst other things), that the defendant, his executors, administrators, and assigns, should and would, at his and their own proper costs and charges, from time to time, and at all times thereafter during the said term, in all things well and effectually repair, uphold, support, &c., amend and keep the said messuage, coach-house, out-offices, and all and singular other the premises thereby demised; and all the walls, party-walls, and fences thereof, and the sewers, ditches, and cesspools used for draining the same; *and all erections and improvements* which, during the said term should be erected, made, or set up, in or upon the premises or any part thereof, when, where, and as often as need or occasion should be or require; and the demised premises and every part thereof, and all such future buildings and improvements as aforesaid, being so in all things well and sufficiently repaired, upheld, supported, sustained, maintained, and amended, and kept, at the end, or other sooner determination of the term thereby granted, which should first happen, peaceably should and would

(a) *Vide antè*, 518 (b).

(b) *Vide antè*, 659.

leave, surrender, and yield up, unto the testator *J. West*, his executors, administrators, and assigns, together with the several fixtures mentioned in the schedule indorsed on the said indenture; and also together with all wainscots, partitions, shelves, cupboards, dressers, mantels, and other chimney-pieces, hearths, slabs, jambs, bells, bell-pulls, sinks, pavements, fences, pales, rails, gates, locks, keys, bars, bolts, leaden pipes, and gutters, and all other things fixed or fastened, or which during the said term might be erected or set up, in, or upon, or affixed or fastened to, the said demised premises or any part thereof, in good plight and condition, reasonable use and wear thereof, in the meantime, only excepted. By virtue of which demise the defendant then entered into and upon all and singular the said demised premises, with the appurtenances, and became and was thereof possessed for the term so to him thereof granted as aforesaid, the reversion thereof immediately expectant on the determination of the same term, then belonging to the testator *J. West* as aforesaid.

The declaration then stated that *J. West* made his will, with a codicil, appointing the plaintiff, one *W. H. West*, and one *E. Elliott* executors; that, on the 10th of September 1830, *W. H. West* died, in the lifetime of the testator *J. West*; that, on the 15th of September 1830, *J. West*, the testator, died possessed of the reversion; that, on the 21st of October 1830, the plaintiff and *Elliott* proved the will, whereby the plaintiff and *Elliott* became possessed (a); that, on the 6th of July 1836, *Elliott* died, whereupon the plaintiff in the said reversion held himself in, and was and continued thereof possessed until the determination of the term granted by the indenture. Breach: that the defendant did not nor would at his own costs and charges

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(a) *Vide post*, 784. (d).

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from time to time, and at all times during the term granted by the said indenture, well and effectually repair, uphold, support, &c., the said messuage, coach-house, out-offices, and all and singular the premises thereby demised, and all the walls, party-walls, pales, and fences thereof, and the rivers, ditches, and cess-pools used for draining the same, and all erections and improvements which, during the term thereby granted, were erected, made, and set up, in, and upon the said premises when, where, and as often as need or occasion required; nor did nor would the defendant leave the same premises, or any part thereof, in all things well and sufficiently repaired, upheld, supported, &c., at the end of the same term, according to the form and effect of the said indenture, but, on the contrary thereof, the defendant, after the making the said indenture (*a*), and during the continuance of the term thereby granted, to wit, on the 1st day of *October* 1830, and from thence for a long space of time, to wit, from thence until the end of the said term, suffered and permitted the messuage, coach-house, out-offices, &c., and all and singular the said demised premises, and all the walls, party-walls, pales, and fences thereof to be and continue and the same and every part thereof were and was for and during all that time out of repair, ruinous, &c., for want of being well and effectually repaired, upheld, &c., and the defendant, at the end of the said term by the said indenture granted, left the same premises and every part thereof so out of repair, and in such bad order and condition as aforesaid, and the defendant, during the last mentioned term, to wit, on the day and year last aforesaid, suffered and permitted a certain erection and improvement, to wit, a certain greenhouse, which,

(*a*) The words “and after the death of the testator *J. West*” appear to be here omitted.

during the last-mentioned term, had been erected, made, and set up, and was then standing upon the said demised premises to be and the same was then pulled down and prostrated, and the materials therefrom coming wholly removed off from the said premises, contrary to the form and effect of the said indenture and of the said covenant of the defendant so by him made in that behalf as aforesaid. By means of which premises, and of the said breaches of covenant, and of the said premises being in such bad order and condition at the expiration of the last-mentioned term, the plaintiff could not let the premises for a long time, to wit, from thence hitherto, and hath thereupon incurred great expense, to wit, an expense of 100*l.*, in taking care of the said premises, and hath lost and been deprived of the rents and profits which he otherwise might and would have done, if the defendant had performed his covenant, &c.

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Plea: first, as to so much and such part of the breach of covenant above assigned as relates to the pulling down and prostrating of the supposed greenhouse, and the materials thereof conveying and removing off from the said premises, *actio non*: because he saith that no such greenhouse had been or was erected, made, or set up, nor was the same standing, in or upon the said demised premises, *modo et formâ*: concluding to the country.

Secondly, to the same cause of action, that the defendant did not suffer or permit the said supposed greenhouse to be, nor was the same pulled down or prostrated, nor were the said materials therefrom coming, or any part thereof, removed from off the said demised premises, *modo et formâ*: concluding to the country.

Thirdly, to the same cause of action, that after the making of the said indenture of lease, and during the term thereby granted, and before the committing of

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so much of the said breach of covenant as in the introductory part of this plea mentioned, or any part thereof, and during the continuance of the said term and in the lifetime of *J. West*, to wit, on the 5th day of *October* 1819, the defendant, by a certain deed poll, then indorsed on the said indenture, and duly signed by him (a) and sealed with his seal (b), and which the defendant now brings into court (c), the date whereof &c., the defendant assigned unto one *T. J. Bellamy* the demised premises: *habendum*, to the said *T. J. Bellamy*, his executors, administrators, and assigns, for all the rest, residue, and remainder of the said term. By virtue of which deed poll the said *T. J. Bellamy* afterwards, to wit, on the day and year last aforesaid, entered into and upon all and singular the demised premises (d), and became and was possessed thereof for all the then rest, residue, and remainder of the said term. The plea then set out a further assignment from *Bellamy* to *George Pepler* on the 22d *December* 1820, and from *Pepler* to *W. Heathcote* on the 2d *August* 1823, and from *Heathcote* to *William Hicks* on the 24th *May* 1825; and that *Hicks*, being so possessed, afterwards, and during the continuance of the term, to wit, on the day and year last aforesaid, it was agreed by and between *Hicks* and *J. West*, and

(a) 29 *Car. 2. c. 3. s. 3.*

(b) At common law a term might be assigned by parol, *Noke v. Awdler*, *Cro. El.* 373. 436.; and the statute of frauds, under which an assignment is not available unless in writing, and signed by the party or his agent, does not require sealing. If a deed were necessary, a delivery as well as a sealing should have been alleged.

(c) The defendant does not

derive title under the deed; besides which, after the expiration of the term, the lease and all the assignments thereof would belong to the reversioner.

(d) The allegation of an entry seems to be unnecessary; *vide Bellasis v. Burbrick*, 1 *Salk.* 209., 1 *Ld. Raym.* 170.; *Williams v. Bosanquet*, 1 *Brod. & Bingham*. 238., 3 *B. Moore*, 500., 1 *Wms. Saund.* 203. (1).

J. West promised *Hicks*, that if *Hicks* would erect, make, and set up a certain erection and improvement, to wit, a greenhouse, in and upon the demised premises during the continuance of the term, *Hicks* should be at liberty to pull down and remove such greenhouse at the expiration of the term, provided no injury were done to the demised premises, in and about the removal of the said greenhouse. Averment: that afterwards, and in the lifetime of *J. West*, and during the term, and whilst *Hicks* continued such assignee, to wit, on the day and year last aforesaid, *Hicks*, confiding in the said agreement and promise of *J. West*, did erect, set up, and make such erection and improvement, to wit, the said greenhouse in the supposed breach of covenant mentioned, in, and upon the demised premises, and *Hicks*, in further pursuance of the said agreement and promise of *J. West*, did afterwards, and at the expiration of the term, to wit, on the 25th of *December* 1838, pull down and remove the said greenhouse from and off the demised premises; and, in so doing, *Hicks* did then necessarily and unavoidably pull down and prostrate the said greenhouse, and the materials therefrom coming wholly removed from off the demised premises as in the assignment of breach of covenant mentioned; that no injury or damage was done to the demised premises in and about the removal of the said greenhouse: which is the committing by the defendant, of so much of the supposed breach of covenant in the said declaration above assigned, and in the introductory part of this plea mentioned; and as it was lawful for him to do for the cause last aforesaid. Verification.

Fourthly, that as to the sum of 72*l.* 3*s.*, parcel of the said sums of money in the declaration mentioned, *actio. ulterius non*, because the defendant now brings into court 72*l.* 3*s.* ready to be paid to the plaintiff. And the defendant further says, that the plaintiff has not sas-

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tained damages to a greater amount than the said sum of 72*l.* 3*s.*, in respect of the cause of action in the introductory part of this plea mentioned. Verification.

The plaintiff added the *similiter* to the first and second pleas, and replied to the third plea, that the defendant of his own wrong, and without the cause in that plea alleged (*a*), committed the breach of covenant in the introductory part of that plea mentioned, *modo et formâ*: concluding to the country. To the fourth plea he replied damages ultra: concluding to the country. To both of these replications the *similiter* was added.

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 May 18.

At the trial before *Tindal* C. J. at the sittings at *Guildhall* after last *Easter* term, the plaintiff proved the affirmative of the issues taken upon the first and second pleas; and shewed himself entitled to 35*l.* damages (which had been contingently assessed by an umpire at that sum), beyond the 72*l.* 3*s.* paid into court under the fourth plea. The defendant, in support of the affirmative of the issue taken upon the third plea, after the formal allegations in that plea had been admitted or proved, called *William Hicks*, who stated, on the *voire dire*, that he had assigned over his interest in the term to one *William Margetson*. *Hicks* proved that during his occupation of the demised premises, he sent the following letter to *John West*, the lessor:—

“ 231, *Borough*, 15th *February* 1830.

“ Dear Sir,—I have some thoughts about erecting a greenhouse in my garden at *Lavender Hill*; but, my term of lease being short, wish to know if you are

(*a*) Supposing it to be allowable to reply *de injuriâ* in covenant, on the ground that it has been found convenient to tolerate such a violation of the rules of pleading in assumpsit

since the lax mode of pleading in that action has been put an end to, this replication seems to be bad, on the ground that the plea does not rest upon matter of *excuse* only.

agreeable that at the end of said term I may be at liberty either to dispose of it at a valuation or remove it; of course on condition that the premises are not to be injured should such removal take place. If I was to have one put up it would be against the wall at back of hen-house or wood-shed, and where, from appearance, I have no doubt one has been formerly, though removed before I had lease. I am adverse to litigation, and unless I can see my way clear, that if I built a greenhouse it would be at my own disposal, shall decline it entirely. The favour of your reply will oblige."

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In answer to this letter the testator *West* wrote as follows:—

"*Guildford, February 22d, 1830.*

"Dear Sir, — I received yours of the 19th, respecting the erection of a greenhouse. I have not the slightest objection to meet your wishes. My intention is to be in *London* some time next month, and will give you a call. Shall feel much pleasure in forwarding your views." (a)

Hicks, acting upon *John West* the testator's letter of the 22d of *March*, erected a greenhouse on the demised premises, but he was unable to state whether the building was commenced before or after the death of *J. West*. *Hicks* was told by his executor, the plaintiff, that he would be clearly entitled to remove the greenhouse.

According to the statement of *Perkins* the carpenter, who erected, and afterwards removed, the greenhouse, it was built of wood on a frame, fixed upon a plank of wood called a plate, which was laid upon mortar placed in the indents of one of three dwarf walls erected by

(a) *Qu.* whether this letter amounts to a final assent.

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Hicks for the front and sides of the greenhouse, the back being formed by an old wall. No holes were made in any part of the walls, the greenhouse being erected with a view to removal. A few days before the expiration of the term, *Hicks*, who had, in *May* 1835, assigned to one *Margetson* upon an understanding that *Hicks* should be at liberty to remove the greenhouse before the determination of the lease, removed the greenhouse, leaving the walls and ground flues, and doing no injury to the premises. The plaintiff had at first demanded from the defendant 60*l.* as the value of the greenhouse, and 72*l.* 3*s.* for general dilapidations, but afterwards increased his demand for such dilapidations to 125*l.* The umpire appointed by arbitrators between the parties had estimated the former at 90*l.* and the latter at 107*l.* 3*s.*

It was contended by Sir *F. Pollock* and *Chilton*, for the defendant, that he was entitled to a verdict upon the first and second issues, on the ground that the greenhouse was not an erection or an improvement within the true construction of the covenant; and upon the third issue, on the ground that the correspondence between *J. West* and *Hicks* amounted to an assent to the removal on the part of the former; and that, as to the fourth issue, the plaintiff was bound by his demand of 72*l.* 3*s.*

Talfourd Serjt. and *Swann*, for the plaintiff, insisted that the greenhouse was clearly both an erection and an improvement; and that although *J. West's* letter shewed a disposition to enter into some arrangement, it could not be understood as amounting to a final agreement between the parties; and that the plaintiff was not bound by his first demand, which was evidently made in ignorance of the full extent of the injury which the premises had sustained, and moreover was not acquiesced in by the defendant.

The Lord Chief Justice told the jury that it was difficult to say that a greenhouse was not an erection or an improvement, and that the witnesses had sworn that it was an improvement; but that the letter of *J. West*, in answer to *Hicks'* application, looked very much like an assent to the removal, and that the greenhouse appeared clearly to have been erected upon the faith of the letter: that the plaintiff was not conclusively bound by his first demand, but that the parties had fixed the amount of the dilapidations by a judge appointed by themselves. His lordship left it to the jury to say, whether the greenhouse was an erection or an improvement, within the meaning of the covenant; whether the plaintiff's testator had assented to the erection and removal of the greenhouse; and at what amount they would assess the dilapidations; and he requested them to find the value of the greenhouse, and to assess damages to that amount on the first and second issues, whatever verdict they might return on the third issue, in order that, if the court should be of opinion that the plea was bad in law, the plaintiff might have judgment for the value of the greenhouse, without putting the parties to the expense of executing a writ of inquiry.

The jury returned a verdict for the plaintiff upon the first, second, and fourth, and for the defendant upon the third issue; and they estimated the value of the greenhouse at 90*l.*, and assessed damages to that amount on the first two issues, and assessed the damages for the dilapidations, *ultra* the 72*l.* 3*s.*, at 35*l.*

On the first day of the following term, *Talfourd* Serjt. moved for a rule calling upon the defendant to shew cause why the plaintiff should not be at liberty to enter up judgment notwithstanding the verdict found for the defendant on the trial of the cause on the third issue joined, for the sum of 90*l.* as the damages assessed in

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1841. respect of the greenhouse, in addition to the damages assessed on the rest of the record.

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Upon the finding of the jury, it must be taken that the facts stated in the third plea are true; but it is submitted that the agreement therein set up, furnishes no defence to the action. A contract under seal can only be discharged by an instrument of as high a nature; *Thompson v. Brown* (a), *Heard v. Wadham* (b), *Rex in aux. Hollis v. Bingham* (c).

May 28. The court having granted a rule nisi for judgment for the 90*l.*, *non obstante veredicto*,

May 30. *Bompas* Serjt. now moved for a rule nisi to reduce the damages, or for a new trial, contending that the first and second issues ought to have been found for the defendant, inasmuch as "erections and improvements" in the covenant must be understood of such erections and improvements as should form part of the house by being affixed to the freehold; *Naylor v. Collinge* (d).

TINDAL C. J. You shall have the benefit of this application when the rule, which has been granted on the motion of the plaintiff, comes on to be heard.

April 29. *Bompas* Serjt. (with whom was *Chilton*) now shewed cause against the rule obtained on behalf of the plaintiff. It is not contended that the provision of a deed can be discharged by parol. The substance of the plea is this: that the act alleged as constituting a breach of covenant on the part of the defendant as lessee is an act done by an assignee of the lease with

(a) 7 *Taunt.* 656., 1 *B. Moore*, 358. 1 *Crompt. & Jervis*, 245., 1 *Tyrwh.* 46., and see *Co. Litt.*

(b) 1 *East*, 619., *antè*, Vol. I. 291. b.; *Com. Dig. Pleader*, (2 *W.* 34, 35. 37.); *antè*, 412.

(c) 3 *Younge & Jervis*, 101., (d) 1 *Taunt.* 19.

the express assent of the lessor himself. There was a given erection on the premises, and the plaintiff's testator authorised the assignee of the lease to remove it. The lessor has no right to complain, if, by an act of his own, he puts it out of the power of the lessee to perform his covenant. *Hicks* may be treated, for this purpose, as a stranger to the defendant. It would have surely been a good plea to say, that the plaintiff himself took away the greenhouse. [*Tindal* C. J. That might have been given in evidence under the second issue, which amounts, in substance, to *non infregit conventionem* (a)]. There is a difficulty in seeing any difference between authorizing *Hicks* to take away the greenhouse, and authorizing the defendant to do it. In *Civitas London v. Greyme* (b), "The mayor and citizens of *London* covenanted to find eight men to grind every day in *Bridewell* mill, which they let to the defendant, and agreed that if they failed therein the defendant should retain so much of the rent out of his rent. The defendant pulled down the corn-mill and made it an horse-mill, and the plaintiffs would not defalk so much out of his

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(a) As to this plea, see *Com. Dig. Pleader* (2 V. 5.); 8 T.R. 278. 280.; 2 Taunt. 278.

(b) *Cro. Jac.* 182. The case is somewhat differently reported by Sir *Francis Moore*. "In debt for the rent of a mill which goes by the labour of the men prisoners in *Bridewell*, and demised by the mayor and commonalty of *London* to one *Grimes* for years, against whom they bring debt, the defendant pleads a proviso in the lease that if the lessors do not find eight men to draw the mill (*de traher le molin*) every day, then,

toties quoties, the lessee should retain from his rent 8d. every day for every man deficient; and the lessee alleges default of the men to the value of the rent. To which the lessors, in their replication, shew that the lessee has pulled down (*dirute*) the mill, and transformed it to be drawn by a horse and not by men, wherefore they did not find men, and so they pray judgment; and it was adjudged with the plaintiff, because the alteration is the act of the lessee himself." *F. Moore*, 877.

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rent as he ought to be allowed for the eight men. But all the court held, that, by the alteration of that mill in this manner, the lessors are discharged of their covenant." If by the act of the covenantee the covenantor is disabled from performing his covenant, the covenant is discharged. If the plaintiff himself had taken away the greenhouse, this would have been precisely the case of *Civitas London v. Greyme*. Here, he authorises a stranger to take it away; and the act of that stranger, done under the authority of the plaintiff, must, in a question between the plaintiff and the defendant, be considered as the act of the plaintiff. If a plea sets out a defence which is good in substance, however informally pleaded, the plaintiff cannot have judgment *non obstante veredicto*. A removal under the authority of the plaintiff's testator is a removal by the plaintiff himself (a). It is the same thing as if the plaintiff had sold the greenhouse to *Hicks*, and *Hicks* had removed it. [*Tindal* C. J. There would have been no doubt, if the plaintiff had authorised *Hicks* by deed to remove the greenhouse; but will a verbal authority be sufficient? *Bosanquet* J. You say that the act was substantially done by *J. West*.] The defendant contends that it is the same thing as if the plaintiff had been present, and had ordered the workmen to remove the greenhouse. [*Tindal* C. J. He does not order but allows him to do it.] The court, by acceding to this motion, would drive the parties to circuitry of action. The defendant will be entitled to sue *Hicks* for the non-performance of his engage-

(a) "If a lease for years be made upon condition not to alien without licence, and after the lessor licences the lessee to alien, and dies before alienation, yet the lessee may alien; for the death of the les-

sor is not any countermand; for this was executed on the part of the lessor as much as it could be." *Co. Litt.* 52. b., where it is said to have been so resolved, in *M. 3 Jac.*, in *Communi Banco*.

ment to keep the covenants in the lease, and *Hicks* will have his remedy over by action upon the contract contained in the letters between himself and the lessor.

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It is submitted that this is a case in which the lessor and a stranger, by mutual agreement, caused a greenhouse to be put up and removed. Lord *Coke* says (a), that "If a man make a feoffment in fee, upon condition that the feoffee shall re-enfeoff him before such a day, and, before the day, the feoffor disseise the feoffee, and hold him out by force until the day be past, the state of the feoffee is absolute, for the feoffer is the cause wherefore the condition cannot be performed, and therefore shall never take advantage for non-performance thereof. And so it is if *A.* be bound to *B.* that *J. S.* shall marry *Jane G.* before such a day, if *B.* marry with *Jane*, he shall never take advantage of the bond, for that he himself is the means that the condition could not be performed: and this is regularly true in all cases."

In *5 Vin Abr., Condition* (M. c.), pl. 5., it is said, "If a man be bound in an obligation of 40*l.* upon condition, or (with, *ove*) defeasance, that if *J. S.* be servant to the obligee for seven years, the obligation shall be void; *per curiam*, it is a good plea that the obligee licensed the servant to go, &c., though the licence be only *by parol*." *Bro. Licences*, pl. 18., citing 6. *E.* 4. 2. (b) The

(a) *Co. Litt.* 206 b.; 2 *Tho. Co. Litt.* 18.

(b) *M.* 6 *E.* 4. fo. 1, 2. pl. 4. That was an action of debt on bond, to which the defendant pleaded, that the bond was indorsed in this manner, that if the defendant *teneat et perimpleat omnes et singulas condiciones in quâdam indenturâ, &c., specificatas, quod tunc obligacio, &c.*; and he said that in the indenture is

contained, that if the defendant should bring to the plaintiff a man to be an apprentice in [the art *de tuma fila*, and should inform another in the said art, &c., then, &c.; and said that in fact he had performed them, &c. And upon this matter the parties were at issue; and it was found, in a nisi prius, for the plaintiff. And now the plaintiff prayed his judgment; and the defendant shewed this

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following cases from 1 *Roll. Abr.* 453. shew that a covenant may be discharged, without deed, by the act of

matter in arrest of judgment — the plea in bar is not sufficient, for the condition is, that if he perform all the conditions in an indenture, &c.; and he does not say in his plea that he has performed all the conditions, nor does he say that the conditions which he has performed are all the conditions comprised within the indenture. A lengthened discussion ensued; in which (as in *M. 6 H.* 71. fo. 10. pl. 18.) no objection was taken that the defendant could not allege the insufficiency of his own plea in arrest of judgment. The next day all the justices were of one opinion that the plea was good enough; because to a common intent, when the defendant shews that two conditions were contained in the indenture, it shall not be intended that there were other conditions in the indenture besides them, &c., unless the plaintiff shews on his side that there are other conditions, &c. *Clarke* (C. J. of C. P.) added that, upon demurrer, the plea would not, peradventure, have been adjudged good; and he afterwards observed, that “where a man pleads a plea in bar, if the plaintiff demur upon the plea, it shall be taken most strongly against him who pleads, and for the greatest advantage of the plaintiff; and, *e contra*, if the plaintiff make title against the bar, then the bar shall be taken most strongly against the plaintiff, because it is confessed by him, and shall be taken for

the advantage of him who pleads it, &c. And also where an issue has been misjoined, the verdict has made the issue to be good; and that has been decided often, &c. And then *Brian* (Serjeant) said (by way of plea in arrest of judgment, *ut videtur*) still to judgment you ought not to go, for the condition in the indenture is, that he should serve the plaintiff for ten years; and he shewed how the plaintiff, within the term, said to him that he should not serve him any longer, *et sic innoxoneravit*, &c. And this discharge by parol is not sufficient, &c. And as to that, the justices held the plea good, because he should not be servant to the plaintiff against his will, for if he should be in service with him he should find him meat and drink, &c.; but it was said that the servant, for the time he had served him, ought to have his salary, &c.” Other objections were taken by *Fairfax* (Serjeant) also of counsel with the defendant, which were overruled on the ground that they were cured by the replication, or, as it is there called, the rejoinder; upon which *Brian* Serjeant said to the Chief Justice, “then according to you [*per vous*], if the plaintiff rejoin (reply) to a plea in bar, a man shall never have jeofail, &c. *Choke* (C. J.) Of such things which are not material he [the plaintiff] by his rejoinder [replication] may make the bar good, but of other things not, &c., wherefore &c. *Moile* (J.), by the assents of his companions, said to the

the lessor (a), "If a man be bound to build a house, he is excused if the obligee will not suffer him to build it; for he cannot come upon the land against his will" (b). If a condition be to repair a house, he (the obligor) is excused if a stranger, by the command of the obligee, disturb him and will not suffer him to do it (c). If a

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plaintiff: Recover your debt of 40*l.*, and your damages taxed by the inquest at 10*l.*, and the costs at 50*s.*, and the defendant in mercy," &c. As to *pleading* in arrest of judgment, see *M.* 31 *H.* 6. fo. 10. pl. 5.; *M.* 35 *H.* 6. fo. 1. pl. 1.; *M.* 11 *H.* 7. fo. 10. pl. 32.; *M.* 21 *H.* 7. fo. 33. pl. 29.; *Ford v. Mead, Noy*, 26.; *Doct. Pla.* 308.

(a) Translated, 5 *Vin. Abr.* 244.

(b) Lord Rolle cites 19 *E.* 4. f. 2. b. *per curiam*. That case (*M.* 19 *E.* 4. fo. 2. pl. 6., which began in *T.* 18 *E.* 4. fo. 8. pl. 12.) was an action of covenant, in which the plaintiff declared upon an indenture, whereby the defendant should, before a certain day, have framed and raised a house, to wit, in length twenty-one feet, and in height twenty feet, for 10*l.* *Catesby* (Serjt.). *Actio. non*, because we say that the defendant had framed the house according to the indenture, &c., and that the plaintiff would not suffer him to raise the said house in length, because the plaintiff had not so much land; for the land was of one *J. B.*; and in height the frame of the house was according to the indenture; and because it was higher than the house to which it was to be joined the plaintiff would not raise it till it was

made equal in height; wherefore, &c. And the opinion of the court was, that the defendant should not have the plea in any other manner, but that he should say that the plaintiff would not suffer him, *for if the defendant had pleaded an agreement of the plaintiff without specialty, &c.*,—for he could not plead in bar without specialty, where the plaintiff counts upon a specialty. But if the defendant had said that the plaintiff would not suffer him to raise the house upon his land, then it had been good; for the defendant cannot come upon the land, &c. without the plaintiff's will, &c. *Quod nota.*

(c) Citing 9 *H.* 6. 44. b., which was the case of *Joan Queen of England* (widow of *Henry IV.*) v. *Lyle*, *M.* 9 *H.* 6. fo. 44. pl. 25. The defendant pleaded that one *A.*, by the command of the plaintiff, disturbed him from repairing, and would not suffer him to do the repairs. The plaintiff replied that *A.* did not disturb the defendant by the command of the plaintiff. This replication being objected to as a negative pregnant, the plaintiff, protesting that there was no disturbance, replied that she did not command *A.* to disturb the defendant. This issue was accepted by the defendant.

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condition be to erect a mill, and afterwards he (the obligor) comes to the obligee, and says that all things are ready for the erecting of it, and asks when he shall come with the mill to erect it, if the obligee says that he will not have the mill, and wholly discharge him of the mill, this shall excuse him of the performance (a). If lessee for years of a house covenant to repair it and to leave it (b) in as good a plight as he found it, and afterwards certain sparks of fire (c) come out of the chimney of the lessor in a house not very remote, whereby the house of the lessee is burnt, this will excuse the performance of the covenant by the lessee, in that he is not bound to rebuild, because this comes by the act of the lessor himself" (d). The cases cited from *Rolle* (e) are recognised by Lord Chief Baron Comyns (g). But the present case is stronger than there cited. There the covenantor was only hindered by the covenantee from doing the act; here the covenantor is a party to the non-performance. In *Ratcliff v. Pemberton* (h), in an action of covenant for the non-payment of demurrage, the defendant only pleaded the general issue (i). The

(a) Citing 3 H. 6. 37. (H. 3. H. 6. fo. 36, 37. pl. 34.) But that was an action on the case against one *Watkins*, a mill-maker of London, for not erecting a mill according to his undertaking. Lord Coke says, *Satius est petere fontes quam sectari rivulos*.

(b) Vide *Luxmore v. Robson*, 1 B. & Ald. 585. The authority cited towards the end of that case was cited from *Fitz. Abr.* tit. *Covenant*, pl. 29., not from *F. N. B.*, as stated in the report. And see 7 Co. Rep. 15. a.

(c) As to the liability of parties, at common law or by the custom of the realm, for damages resulting from their

fire, however occasioned; see *Beaulieu v. Finglam*, P. 2 H. 4. fo. 18. pl. 5.; 1 Roll. Abr. 1.; 1 Vin. Abr. 215.; *Vaughan v. Menlove*, 3 New Cases, 468., 4 Scott, 244., 7 Car. & P. 525. And see *Dig. lib.* 47. tit. 9. l. 12.

(d) 6 Anne, c. 31. s. 6.; 14 G. 3. c. 78. s. 86.

(e) Vouching an original case in 12 Jac.

(g) *Com. Dig.* tit. *Condition* (L. 6.).

(h) 1 Esp. N. P. C. 35.

(i) From the use of this term throughout the report in *Espinasse*, it has been supposed that the plea was *non est factum*. It is however clear, that by the general issue, was meant,

defence set up was, that the plaintiff, who was master and owner of the ship, had waived all claim to demurrage by consenting that the time for discharging the cargo should be enlarged; and evidence was offered to prove that the defendant, who was the consignee, could have discharged the cargo by the time limited, but that the plaintiff gave him leave to take out the cargo as he was waiting for a freight. Lord *Kenyon* said that the licence and acquiescence of the plaintiff was a good and legal defence against any claim for demurrage; but that the plaintiff should have known that the defendant meant to rely on that matter in his defence, and that it should have been specially pleaded. By the statute of frauds, a surrender can only be in writing, yet in *Doe dem. Winckley v. Pye (a)*, Lord *Kenyon* held the acts of the parties to amount to a virtual surrender. The forfeiture of a lease by breach of covenant may be waived by the conduct of the covenantee, without any release under seal; *Doe dem. Sore v. Ekins (b)*, *Doe dem. Knight v. Rowe (c)*. [*Coltman J.* In *Fraunces's* case (*d*), Lord *Coke*, in giving judgment, cited the case in 35 *H. 6.* tit. *Barre*, 162. (*e*). "The master of *St. Katherine's* let three houses to one by indenture, on condition that he should not permit or harbour any whore (*feme puteine*) within the said house, if he be warned thereof by the master or his servant; and if she remain there for six weeks after warning by the master or his servant, that then the

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a plea traversing the breach assigned; as Lord *Kenyon* said, "That all that appeared on the face of the pleadings was, a denial of the plaintiff's claim of demurrage, whereas the defence confessed and avoided it." And see *Mann. N. P. Index, Licence*, pl. 1.

(a) 1 *Esp. N. P. C.* 364.(b) *Ryan & Mood.* 29. .
1 *Carr. & P.* 154.(c) *Ryan & Mood.* 343.;
2 *Carr. & P.* 246.(d) 8 *Co. Rep.* 89. b.(e) *Fitz. Abr.* tit. *Barre*,
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master and his successor should re-enter ; and it was shewn that the lessee suffered such a whore to remain there ; wherefore such servant of the master made warning to him that he should not suffer her to remain there ; and he would not (attend to the warning), but suffered the said woman to remain there for the space of six weeks ; wherefore the said master ousted him, &c. To which the lessee said, that after the warning made the master commanded the whore to lie in one of the said houses, and to remain there for six weeks after ; *without* this, that she remained there by the said plaintiff. And it was held by the whole court that that replication was not good, because the indenture is, *quod non permittat* any whore to remain there : as if I am bound to you to enfeof you of an acre of land before such a day, within which time you disseise me, that is not to the purpose ; for you had no colour to enter upon me, and I may re-enter and make the feoffment. So, in this case, the master had no colour to put the whore into possession ; wherefore the lessee might well oust her. So, it is no plea, without special matter shewn. Wherefore the lessee said that the master ousted him, and with force, and against the will of the lessee, put her in, and made her remain there, with force, against the lessee's will for six weeks, &c., and that was held a good plea." There, the distinction, between a simple dispensation and a forcible act on the part of the lessor, is adverted to.] That case appears to support the position for which the defendant contends. The plea first pleaded did not shew that the defendant could not have turned the woman out. If the defendant had pleaded that the plaintiff had put the woman in without the knowledge of the defendant, it is submitted that such a plea would have been good. Here, it is shewn by the plea, that the defendant had no right to interfere. [*Tindal* C. J. The lessee is always

answerable for the act of the assignee.] That would, no doubt, be so in a case where the plaintiff had not interfered. The law revolts at the position that the covenantee should himself authorise a breach of the covenant, and then sue the covenantor for that very breach.

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Talfourd Serjt., in support of the rule for judgment *non obstante veredicto*. Unless the agreement at the time it was entered into had the effect of discharging the covenant, the third plea is no answer to the action(a). At the time *Hicks* erected the greenhouse, he had no right to act upon an agreement which, being by parol, had no operation. The law does not permit a contract under seal to be varied by parol. If it were otherwise, a false case would be frequently set up to defeat a solemn instrument, and false witnesses would be called to support it. In *Ratcliff v. Pemberton*, it was unnecessary to decide whether the licence, if pleaded, would have been a defence to the action, and the question as to the insufficiency of a parol licence to discharge a covenant was not considered. *Doe dem. Winckley v. Pye* only shews that where a landlord has acquiesced in acts done by the tenant, it may be inferred that those acts were done under a sufficient authority. *Doe dem. Knight v. Rowe* merely shews that the Lord Chief Justice was of opinion that a landlord cannot recover in ejectment against a party whom he has induced to become tenant upon a representation that there had been no breach of the covenant upon which he is endeavouring to enforce a forfeiture. [*Tindal* C. J. In that case it

(a) But an award, or an award with satisfaction, may be pleaded where a mere sub- mission to arbitration (as an accord without satisfaction), would be no defence.

1841. is expressly said, that there was no dispensation.]
— The cases of *Heard v. Wadham*, *Thompson v. Brown*,
WEST and *Rex v. Bingham* have received no answer, and
v. the principle of this case, namely, that a deed cannot
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recognised in this court in the late case of *Harris v.*
Goodwyn. (a)

TINDAL C. J. This is an action of covenant brought by the surviving executor of the lessor, who was himself a termor, against the lessee, upon a covenant in the lease, to yield up the demised premises at the expiration of the term, together with all erections and improvements which, during the term thereby granted, should be erected, made, or set up, in or upon the said premises or any part thereof. The defendant, in his third plea states, that the interest in the lease vested in one *Hicks*, as assignee of the term, and that it was agreed between the lessor and *Hicks*, that if *Hicks* would erect, make, and set up a certain erection or improvement, to wit, a greenhouse, in and upon the demised premises, during the continuance of the last-mentioned term, *Hicks* should be at liberty to pull down and remove such greenhouse at the expiration of that term, provided no injury was done to the demised premises in and about the removal of the greenhouse. It being found by the jury that the plea is true in fact, the question now arises whether it is good in point of law; and it appears to me, upon the best consideration I can bring to that question, that the plea contains no legal answer to the declaration. If the lessor had occasioned the breach, that would have been an answer to the complaint founded on that breach, not on the ground of an agreement, but because the act complained of would have been the act

(a) *Ante*, 405., 2 *Scott*, N. R. 459.

of the lessor himself, and not, as charged, the act of the lessee. The lessee might have said—this was your own act, and therefore you are not damnified. But this plea appears to me to set up that which is merely a parol licence. Now it is a well-known rule of law, that *Unumquodque ligamen dissolvitur, eodem ligamine quo et ligatur* (a). This is so well established, that it appears to me unnecessary to refer to cases. I will mention only *Rogers v. Payne* (b), which was an action of covenant for the non-payment of money; the defendant pleaded a parol discharge in satisfaction of all demands. It was held, upon demurrer, that the covenant could not be discharged without a deed; and *Blake's case* (c) was cited. Now if an action had been brought against the assignee, to have set up this defence would have been in direct violation of the rule to which I have adverted. How can it be an answer for the lessee, if not for the assignee? Cases of conditions which have been waived, or the performance of which has become impossible, do not, I think, apply. No doubt in the case of a bond, if the breach be occasioned by the obligee, or if the performance of the condition be rendered impossible by his act, no forfeiture is incurred. Though the *bond*, however, is under seal, the *condition* is of a thing resting on evidence only. It may be compared to matter *in pais* (d). But in the case of a covenant the whole matter is under the seal of the party; and the contract into which he has entered can be discharged only by an instrument of the same nature as that by which the

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(a) As to this maxim, vide 2 Inst. 360., *Wingate's Maxims*, 68—72., and the cases there collected.

(b) 2 Wils. 376. In that case there does not appear to have been any consideration for the parol discharge.

(c) 6 Co. Rep. 43. b.

(d) The distinction usually taken, is, between matter of record and matter *in pais*, strictly so called, i. e. between things transacted in court and things transacted between parties out of court. 2 Blac. Com. 294.

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contract was created. If it could be maintained, as was contended on the part of the defendant, that the third plea disclosed an act which the lessor had done, or which he had compelled to be done, I think it would have been good. It would have been like the well-known plea of "damnified by his own default." But that does not appear to me to be the true construction of this plea; and I think that the rule for entering up judgment *non obstante veredicto* must be made absolute.

BOSANQUET J. I am of opinion that the facts stated in the third plea afford no answer to the breach of covenant to which that plea is addressed. No rule of law is more fully established than this, that a contract under seal cannot be varied by a parol contract. I agree that if the covenantee prevent the performance of the covenant by an act of his own, his right of action for the breach of that covenant is destroyed. But the act, to constitute such a defence, must be the *immediate* act of the covenantee. Here, an executory agreement, entered into during the term, is attempted to be set up as an answer to an action brought upon a breach of covenant committed at the expiration of the term. The covenant was directly broken. With respect to *Doe d. Knight v. Rowe*, that was an ejectment for a forfeiture; and the fair result of Lord *Tenterden's* language is, that there is a disposition in the courts to lean against a forfeiture (a).

COLTMAN J. I cannot consider this case as different from what it would have been, if the defendant had continued to be tenant, and had himself done the act complained of; because the assignment to *Hicks* was the

(a) But see the observations of the same learned judge in *Doe d. Davis v. Elsam, Mood. & Malk. 189. ante 527. (a).*

consequence of his own voluntary act. The fallacy of the argument which has been put forward on behalf of the defendant is, that it assumes that there was an act done by the lessor by which the lessee was prevented from performing his covenant. This falls within the master of *St. Katherine's* case, cited in *Fraunces's* case.

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ERSKINE J. I am of the same opinion. The only defence disclosed by the third plea is, that the removal of the greenhouse took place with the assent of the lessor. The most that can amount to is, that there was a parol agreement to dispense with the performance of that which the defendant had engaged, by covenant, to do. If the defendant's engagement had not been under seal, this parol dispensation would have been a good defence to an action; but the original contract being under seal, performance cannot be dispensed with by an agreement *not* under seal. It appears to be admitted (a) that if this action had been brought against *Hicks*, the parol agreement would have been no defence. I am therefore of opinion that this rule ought to be made absolute.

Rule absolute. (b)

(a) The admission seems rather to have been, that if the agreement would not protect *Hicks*, it could not protect the defendant.

(b) Accord with satisfaction *after* covenant broken, is a good plea, "for the action is not merely grounded on the deed, but also on the deed and the wrong subsequent, which wrong is the cause of the action." *Blake's case*, 6 Co. Rep. 44. a. "Covenant: for that the lessee covenanted, for him and his assigns, to repair and maintain the house in repara-

tion, from time to time, during the term; and shews that the lessor assigned all his term to the defendant. And for default of reparations, after the assignment, he brought the action against the assignee. The defendant pleads that, after the decay, he made such a concord—that the plaintiff should have 30s. and such goods, in satisfaction of that destruction, &c., and shews it to be executed. Whereupon it was demurred, and moved for the plaintiff, that it was not any plea; for the action being grounded upon

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Talfourd Serjt. then shewed cause against the rule to reduce the damages or for a new trial. The question upon the first issue is not, whether the greenhouse was a *fixture*, but whether such a greenhouse as is mentioned in the declaration, and which is there described as a certain erection and improvement, had been erected or was standing upon the demised premises. The covenant was intended to embrace things which do not commonly pass under the denomination of fixtures. [*Tindal* C. J. When I was told that I must leave to the jury the question whether this was a fixture or not, I said, I will leave it in the very terms of the issue]. According to the evidence, however, this was clearly a fixture.

Bompas Serjt. in support of his rule. The terms of the issue were, whether any *such* greenhouse had been

a deed, cannot be discharged unless by deed; as an obligation, with a condition, cannot be discharged by a contract. But all the court held that the plea was good enough; for it is not pleaded in discharge of the covenant, but only for the damages which are demanded by reason of the breach of the covenant, and the covenant remains; and this plea sounds only in discharge of the defendant, and it is not like to the case of an obligation, for there it is a duty certain, and it is not any plea, although it be before or after the day of payment: and in every action where only amends is demanded by way of damages, accord executed is a good bar." *Alden v. Blague*, Cro. Jac. 99.

In *Snow v. Franklin*, 1 Lutw. 359., the exception taken to the plea was, that the concord, &c. was pleaded in

satisfaction of the covenants (which were not broken at that time, as the defendant himself had alleged); and that could not be, because the covenants, being created by deed, could not be discharged but by deed: but award with satisfaction is a good plea in satisfaction and discharge of the damage upon the *broken* covenant. And of this opinion was the whole court, overruling *Rabbetts v. Stoker*, 2 Roll. Rep. 187., where it had been held that accord with satisfaction was a good discharge of covenants executory *before* breach. And see *Anon. Cro. Eliz.* 46.; *Samford v. Catcliffe*, Yelv. 124.; *Eeles v. Lambert*, Aleyn, 38, 39.; *Noyes v. Hopgood*, Cro. Jac. 650.; *Wyvil v. Stapleton*, 1 Stra. 615.; 1 Roll. Abr. 266. tit. *Arbitrement* (U.), pl. 8., 3 Vin. Abr. 103.; Com. Dig. tit. *Pleader* (2 V. 9.).

erected, &c. But in order to understand the meaning of the term "*such* greenhouse," it would be necessary to look not only to the terms of the breach, to which the first three pleas are addressed, but also to the language of the covenant upon which that breach is assigned. The stating to the jury the very words of the issue would not, therefore, present to their minds any question as to whether this greenhouse was or was not a fixture, or whether the erections and improvements mentioned in the covenant were, or were not, limited to such erections and improvements as should be affixed to the freehold. [*Bosanquet J.* . Have they not wisely avoided the debatable word "fixture?" *Tindal C. J.* The lessor would not have complained of the removal of a hat fixed to a peg]. The case of *Naylor v. Collinge* (a) was cited at the trial. There, it was held, that a covenant to yield up in repair all erections and buildings erected during the term upon the demised premises, includes erections and buildings erected and used by the tenant for the purposes of trade, if such erections or buildings be let into the soil, or are otherwise fixed to the freehold, but not those which merely rest upon blocks or pattens. In giving judgment, the court said — The thing removed is described as resting upon blocks or pattens. It is, therefore, a mere chattel, and is not an erection or building within the meaning of the covenant. In *Buckland v. Butterfield* (b), a conservatory on a brick foundation attached to a dwelling-house, and communicating with it by windows opening into the conservatory, and a flue passing into a chimney in the dwelling-house, was held to have become part of the freehold. But the ground upon which it was so held was, that it was shewn not to be removable without injuring the premises. [*Bosanquet J.* Was that an

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(a) 1 *Taunt.* 19. And see 5 (b) 2 *Brod. & Bingh.* 54.,
B. & Ad. 715., 2 *N. & M.* 428. 4 *B. Moore*, 440.

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action of covenant?] It was an action on the case for waste. But it is submitted, that the question of fixture or no fixture cannot depend on the form of the action. In *Davis v. Jones* (a) it was held that trover would lie for certain parts of a machine erected during the term, which were capable of being removed without injury, and had been usually valued between out-going and incoming tenants. Here, it was proved that the greenhouse was removable, and was actually removed, without any injury or damage to the demised premises. The terms "erections and improvements" in the present case must be construed from the context, which speaks only of things affixed to the freehold; the first part of the covenant relating to fixtures erected at the time of the commencement of the demise, the second, to fixtures erected during its continuance. The term "erections" is also explained by the term "improvements", with which it is coupled; as the demised premises cannot be said to be improved by that which is not affixed to the freehold. When a lessee covenants to leave "improvements", he does not engage to leave that which, but for such covenant, would be no improvement.

TINDAL C. J. I left the question to the jury in the very terms of the issue. If, as has been suggested, I was wrong in doing that, there ought to be a new trial. I thought, at the time, that the parties had adopted the words "erections and improvements" for the very purpose of avoiding all discussion as to what might be considered as coming within the description of a fixture, which is the term generally used in covenants.

BOSANQUET J. When I heard the covenant read, I thought the word "fixture" had been purposely omitted

(a) 2 B. & Ald. 165.

in order to avoid any technical niceties. "Erection and improvement" are not technical words. I think this greenhouse was an *improvement* within the meaning of the covenant; and it was undoubtedly an *erection*.

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COLTMAN J. The covenant is useless, unless it goes further than is contended. The argument on the part of the defendant gives no effect to the words "erections and improvements." It appears to me, however, that this greenhouse was a *fixture*.

ERSKINE J. I should have entertained some doubt, upon the authority of *Naylor v. Collinge*, whether the parties, on entering into the covenants contained in this lease, did not contemplate such erections and improvements as are affixed to the freehold. I am glad, however, that the court do not send this case down to a new trial, because I think that, if sent down, the jury would be warranted in finding that this greenhouse was a *fixture*.

Rule discharged. (a)

(a) For the *Roman* law of fixtures, see *Dig. lib. 19. tit. l. 13. § 14—18*. For the present *French* law of fixtures, see *Code Civil des Français*, No. 517—532. (For the ancient *French* law, see *Ferrière, Dict. de Droit. tit. Immeubles par*

fiction.) For the *Prussian* law of *Pertinenz-stücke* (things appurtenant or annexed) see *Allgemeines Landrecht für die Preussischen Staaten, Ersten Theil, Zweiten Titel, § 42—108*.

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May 5.]

WOOLMER and Another v. DEVEREUX.

The court refused to set aside an order made by a judge at chambers, requiring the plaintiffs to permit the defendant to inspect and take a copy of the promissory note on which the action was brought, although it appeared that no special ground was shewn for the order at the time that it was made.

CHANNELL Serjt. moved for a rule, calling upon the defendant to shew cause why an order made in this cause by *Alderson* B. at chambers should not be rescinded.

It appeared from the affidavits, that the defendant had taken out a summons returnable before the learned baron, calling upon the plaintiffs to shew cause why the defendant should not be permitted to inspect, and take a copy of, the promissory note on which the action had been brought, upon payment of the costs occasioned by such inspection. It was contended before the learned baron, on behalf of the plaintiffs, that his lordship ought not to make the order sought for, unless it were shewn by affidavit, according to the usual practice, that some necessity existed for the defendant to have a copy of the instrument. The learned judge, however, made the order, stating that the practice alluded to was obsolete, and that he had, on several occasions, made similar orders, without any such affidavit.

Channell Serjt. now contended, that the learned baron had not any authority to make the order, without some special ground being laid for it by affidavit. He cited *Threlfall v. Webster* (a), *Hildyard v. Smith* (b), *Lush's Practice*, vol. ii. p. 747., *Archb. Pra. by Chitty*, vol. ii. p. 1023.

(a) 1 *Bingh.* 161., S. C.
7 *B. Moore*, 559.

(b) 1 *Bingh.* 451., S. C.
8 *B. Moore*, 586.

TINDAL C. J. There is no doubt that a judge has authority to make such an order, if circumstances call for it, as where there is any suggestion that the instrument is a forgery, or that it has been altered since it was signed, or the party swears that he has no recollection of ever having executed such a document. It does not appear to me that we ought to interfere in this case by setting aside the order. It was matter of discretion for the learned judge to whom the application was made. In the course of time, the practice of the judges upon this point will be assimilated, and some uniform rule adopted.

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BOSANQUET J. It is quite clear that the learned judge had jurisdiction to make the order.

COLTMAN and ERSKINE Js. concurred.

Rule refused.

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FOWLER and Others v. RICKERBY and Others.

The plaintiffs having obtained judgment in an action against a public officer of a banking company, under the 7 G. 4. c. 46., sued out a *scire facias* against fifteen persons, whom they charged as members of the co-partnership. The sheriff returned *nihil* and *non sunt inventi* as to

the whole. Twelve of them voluntarily appeared, and the plaintiffs prayed execution against them. On demurrer, assigning for cause, that although fifteen persons were included in the writ, the declaration was against twelve only:—Held, that the variance between the writ and the declaration, if an irregularity, should have been taken advantage of by motion, and was not ground of demurrer.

Held, also, that in proceedings under the act, the non-joinder of other parties could not be pleaded in abatement.

The plaintiffs declared in *scire facias*, reciting a judgment recovered against one *M.*, one of the public registered officers, for the time being, of a banking company, under the 7 G. 4. c. 46., and prayed execution against certain parties who were alleged to have been, at the time of recovering the judgment, and still to be, members of the co-partnership. Plea, that at the time of the said recovery the said *M.* was not one of the public officers of the said co-partnership in manner and form as the plaintiffs had alleged; concluding to the country. Held, on special demurrer, that as the plea traversed matter neither expressly alleged in the declaration nor necessarily to be implied, it was bad for not concluding with a verification. Held, also, that if it was intended by the plea to allege that *M.* had *ceased* to be the public officer of the company after the commencement of the action, and before judgment recovered, the defence was insufficiently stated.

bankers in *England*, and which said *W. Marston* had been duly nominated, appointed, and registered as such public officer, and was then sued for and on behalf of the said company, according to the form and effect of the said act of parliament, — 580*l.* 14*s.* for their damages which they had sustained, as well on occasion of the not performing certain promises then lately made by the said company to the said *Sarah Fowler, &c.*, as for their costs and charges by them about their suit in that behalf expended, whereof the said *W. Marston* was convicted, as by the record and proceedings thereof then still remaining in the said court manifestly appeared; and then on behalf of the said *Sarah Fowler, &c.*, in the same court, our lady the Queen was informed, that although judgment was thereupon given, yet execution of the damages aforesaid still remained to be made to them; and our said lady the Queen was also informed, on behalf of the said *Sarah Fowler, &c.*, that *Thomas Rickerby, John Johnson, James Wallworth, James Wallworth the younger, George Bradshaw, Robert Field, James Little, Joseph Allen, John Bennett, Joseph Bennett, John Chettle, Robert Gough, Joseph Marler, and J. W. Kirkbride*, at the time of the recovering and giving of the said judgment, were and from thence had been, and still were, members of the said co-partnership; wherefore the said *Sarah Fowler, &c.* had humbly besought our said lady the Queen to provide them a proper remedy in that behalf; and our said lady the Queen being willing that what was just in that behalf should be done, commanded the said sheriffs that, by honest and lawful men of their bailiwick, they should make known to the said *Thomas Rickerby, &c.* that they should be before the said justices of our said lady the Queen at *Westminster*, on the 17th of *June* 1840, to shew if they had or knew, or any or either of them had or knew, of any thing to say for themselves or himself, why the said

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Sarah Fowler, &c. ought not to have execution against the said *Thomas Rickerby, &c.* of the damages aforesaid, according to the force, form, and effect of the said recovery, and of the statute in such case made and provided, if it should seem expedient for them so to do; and further to do and receive what our said justices should then and there consider of them in that behalf: and that the said sheriffs should have there the names of those by whom they should make known to them, and that writ. After this recital the declaration proceeded as follows: At which day came here the said *Sarah Fowler, &c.*, by *T. H.*, their attorney, and offer themselves on the fourth day against the said *Thomas Rickerby, &c.* And the sheriffs, to wit, *William Evans* and *John Wheelton*, sheriffs of *London* aforesaid, at that day returned that the said *Thomas Rickerby, &c.* had not nor had any of them any thing in their bailiwick whereby they could make known to them, or any of them, as by the said writ they were commanded, nor were they the said *Thomas Rickerby, &c.*, or any of them, found in the same. And the said *Thomas Rickerby, John Johnson, James Walkworth, James Walkworth the younger, George Bradshaw, Robert Field, James Little, Joseph Allen, Henry Allen, John Bennett, Joseph Bennett, John Chettle, Robert Gough, Joseph Marler, and J. W. Kirkbride*, at that day being solemnly demanded, the said *Thomas Rickerby, John Johnson, James Walkworth, James Walkworth the younger, Robert Field, John Bennett* and *Joseph Bennett*, by *E. C.* their attorney, come, and the said *James Little*, by *N. C. M.* his attorney, comes, and the said *Joseph Allen* and *Henry Allen*, by *J. L.* their attorney, come, and the said *John Chettle*, by *W. F.* his attorney, comes, and the said *Joseph Marler*, by *T. H. B.* his attorney, comes. And hereupon the said *Sarah Fowler, &c.* pray that execution against the said *Thomas Rickerby, John John-*

son, *James Wallworth*, *James Wallworth* the younger, *Robert Field*, *John Bennett*, *Joseph Bennett*, *James Little*, *Joseph Allen*, *Henry Allen*, *John Chettle*, and *Joseph Marler*, may be adjudged to them of the damages aforesaid, according to the force, form, and effect of the said recovery, and of the statute aforesaid.

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Special demurrer by *J. Marler* to the declaration, assigning for causes, — that although it appears by the said declaration that the said writ in this behalf was issued at the suit of the plaintiffs against the said *George Bradshaw*, *Robert Gough*, and *J. W. Kirkbride*, together with the said defendants *Joseph Marler*, *Thomas Rickerby*, &c., yet it doth not appear by the said declaration that the said *George Bradshaw*, *Robert Gough*, and *J. W. Kirkbride* are, or that any of them are, included therein, or that any further proceedings have been taken against them, or any of them; nor doth it appear by the said declaration that the said *G. Bradshaw*, &c., or any of them, were or was liable to be sued in this behalf, or that the said defendant *Joseph Marler* was or is liable to be sued in this behalf jointly with the said *G. Bradshaw*, &c., or why the said last-mentioned persons were inserted in the said writ, or why they or any of them were or are omitted from the said declaration, and also, &c.

Joinder in demurrer.

Channell Serjt., in support of this demurrer. The declaration is clearly irregular, and there is no doubt that the proceedings might have been set aside on that ground. In *Sainsbury v. Pringle* (a), where the plaintiff issued a joint *scire facias* against *A.* and *B.*, bail of *C.* and *D.*, upon which *A.* only was summoned, *B.* not being found, and *A.* entered an appearance for himself

(a) 10 B. & C. 751.

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only; it was held that a declaration against him alone was irregular. The only question is, whether the irregularity may be taken advantage of on demurrer; and it is submitted that it may. Here, the parties sued have a right to plead the non-joinder of the other parties; for that a plea in abatement may be pleaded in *scire facias* appears from 2 *Wms. Saund.* 72. r. n., citing *Allice v. Gale.* (a) Where, however, as in this case, the objection is apparent on the proceedings, the defendant is not obliged to plead in abatement, but may avail himself of the irregularity by demurrer. The plaintiffs were bound to make their proceedings on the face of them regular, and they should have signed judgment against those defendants who did not appear.

Stephen Serjt., contra. No irregularity has been shewn to exist in the declaration; but, even if there had, such irregularity would not have been ground of demurrer. This case is distinguishable from *Sainsbury v. Pringle.* There, the *scire facias* was against the two bail jointly, and the basis of the decision was, that the plaintiff had elected to consider it as a joint proceeding against them. Here, the form of the *scire facias* is different, the sheriffs being commanded to make known to the defendants that they should appear before the justices “to shew if they had or knew, or any or either of them had or knew, of any thing to say for themselves or himself,” why the plaintiffs should not have execution against them. In 2 *Wms. Saund.* 72. r. n. it is laid down, citing 1 *Roll. Abr.* 890. (S.) pl. 1. (b), that “where a man recovers judgment for damages against two, and sues out a *scire facias* against them to have execution, if it be returned that one was summoned, and he makes default, and that the other has nothing, the plaintiff may

(a) 10 *Mod.* 112.

have execution against him who was summoned and made default, for the whole." The same principle is applicable to the present case. If, as contended on the other side, the plaintiffs should have signed judgment against the three parties who did not appear, they may do so at any time, or may enter a *nolle prosequi*. Although the non-joinder of parties may be objected to in *scire facias*, as well as in other proceedings, it must be by plea in abatement and not by demurrer; *Cabell v. Vaughan* (a); *Jeffreson v. Morton*. (b) [*Tindal* C.J. This is an objection that there is a variance between the declaration and the writ, which is always matter of motion and not cause of demurrer.] *Thompson v. Dicas* (c) is a decisive authority upon that point. *Panton v. Hall* (d) goes far to prove that the omission of these three parties affords no ground of demurrer. *Sandon v. Proctor* (e) shews that you cannot demur for a breach of a rule of practice. *Bayley* J. there says, "I am not aware of any case where a party who, in pleading, has relied upon the practice of the court, has not failed." It is clear from *Knight v. Parker* (g) that this is at most an irregularity in a matter of practice.

But this case does not stand on ordinary grounds. Taking a liberal view of the 7 G. 4. c. 46., on which this *scire facias* is founded, the declaration is free even from any irregularity. The courts have concurred in holding that the proper mode of proceeding under the statute is by *scire facias*; *Bosanquet v. Ransford* (h), *Cross v. Law* (i), *Whittenbury v. Law*. (k) The manifest intention of the legislature was, that the public

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(a) 1 *Wms. Saund.* 291.(b) 2 *Wms. Saund.* 8 c. *Ib.* 9 a. n. 10.(c) 3 *Tyrwh.* 873., 1 C. & M. 768. *Sed vide post*, 779 n.(d) 2 *Salk.* 598.(e) 7 *B. & C.* 800.(g) 2 *W. Bla.* 759.(h) 11 *A. & E.* 520., 3 *P. & D.* 298.(i) 6 *M. & W.* 217., 8 *Dowl.* 789.(k) 6 *New Cases*, 345., 8 *Scott*, 661.

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might have recourse to any one member of the co-partnership, and that there should be no necessity to have execution against all, but that a party might proceed against such members as he thought proper. The ninth section enacts, that actions against the co-partnership may be instituted against the public officer, as the nominal defendant, on behalf of such co-partnership. By the twelfth section, judgments obtained against any public officer, shall operate against the co-partnership. By the thirteenth section it is provided, that execution, upon any judgment obtained against any public officer, may be issued "against any member or members, for the time being, of any such corporation or co-partnership;" and in case any such execution shall be ineffectual, then "against any person or persons who was or were a member or members of such corporation, &c. at the time when the contract or contracts, &c. on which such judgment may have been obtained was or were entered into, or became a member at any time before such contracts, &c. were executed, or was a member at the time of the judgment obtained." And the fourteenth section enacts, "that every such public officer in whose name any such suit or action shall have been commenced, prosecuted, or defended, and every person or persons against whom execution upon any judgment obtained or entered up as aforesaid in any such action shall be issued as aforesaid, shall always be reimbursed and fully indemnified for all loss, damage, costs, and charges, without deduction, which any such officer or person may have incurred by reason of such execution, out of the funds of such co-partnership, or in failure thereof by contribution from the other members of such co-partnership, as in ordinary cases of co-partnership."

The last-mentioned section, by giving an express indemnity to the public officer and to every member sued, and requiring that they shall be fully reimbursed

by the co-partnership, has an important bearing on the question raised in this case.

The reason why a plea in abatement is allowed in *scire facias* — “because every tenant of the land is entitled to have contribution, that is, all the lands of the consor or defendant to the judgment in the hands of the several purchasers must be extended and equally charged; therefore, unless *all* the tenants be warned, the others are not obliged to answer; and if the tenant does not take advantage of the omission in the first instance by a plea of this sort, which he may do notwithstanding the sheriff’s return, he loses the benefit of contribution, or of relief by an *audita querela*, in case execution is taken out against his land alone” (a) — fails in the present case; for here the parties who appear may have contribution from the rest of the co-partnership without being obliged to bring them before the court.

Channell Serjt., in reply. Where, as here, the irregularity appears on the face of the proceedings, it may be taken advantage of by demurrer. The present case is not to be distinguished from *Sainsbury v. Pringle*. Although the *scire facias* calls upon the defendants *or any one of them*, it is to shew cause why execution should not issue against them *all*. In *Jeffreson v. Morton* the objection did not appear on the record, but was raised by the plea in abatement. With respect to the argument founded on the statute, it must go the length of saying that a plea in abatement cannot be supported to a *scire facias* under the act. [*Erskine J.* Do you contend that if a *scire facias* is issued against three, they can plead in abatement that there were 200 other members of the company? Would not that defeat the whole object of the act?] The argument must be

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(a) 2 *Wms. Saund.* 9. a. n. 10.

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carried to that extent. If it is necessary to shew that at the time of issuing the *scire facias* the three parties were alive, that sufficiently appears on the record.

TINDAL C. J. In this case the plaintiffs have sued out a *scire facias* against fifteen persons, whom they allege, at the time of their recovering a judgment against a public officer, were, and from thence hitherto have been, and still are, members of a corporation represented by such public officer, and against which fifteen persons the plaintiffs pray judgment. The sheriffs make a similar return as to all of the defendants, saying that they have nothing in their bailiwick, neither are they to be found therein. Twelve of the defendants come in voluntarily and plead, some of them together and some separately, leaving three unaccounted for out of the fifteen. One of those who appear has demurred to the declaration on the ground that the *scire facias* issued against fifteen parties, whereas the declaration is against only twelve of them. The question is, whether that is a cause of demurrer. *Sainsbury v. Pringle* shews that a variance between the process and the declaration is matter of irregularity, which may be taken advantage of by an application to the court; and in that case, a *scire facias* having issued against two defendants, and the declaration being against one only, the proceedings were set aside. In the first place, however, the very circumstance of this being an irregularity militates against its being an objection to the record which may be taken by demurrer. The general rule, undoubtedly, is, that if you mean to except to the proceedings on the ground that the writ includes more than the declaration, you must apply to the court, and not set it up as an answer on the record. Putting this as an objection on the record can only be upon the supposition that it sufficiently appears thereon that the writ is abated. But

to constitute a good plea in abatement it must appear that the party of whose nonjoinder you complain is living, for the plea professes to give the plaintiff a better writ. All that this record says, is, that upon the day on which the *scire facias* issued, the plaintiffs undertook to shew that the several persons included in the writ, were members of the corporation. But *non constat* that at the time when the sheriff made his return, the three parties, as to whom the record is silent, were then living, or that the plaintiffs had any power or authority to proceed against them. I think therefore that the facts disclosed on the record do not sufficiently shew that the writ could have been abated, and that the same answer must be given to this demurrer as the court gave in *Cabell v. Vaughan*. (a)

But it seems to me that there is another ground on which this demurrer cannot be supported, namely, that a plea in abatement was never contemplated by this statute at all. The act (s. 6.) authorises parties to bring actions against the public officer alone of the corporation; and judgment being recovered against such officer, by the thirteenth section, execution "may be issued against any member or members, for the time being, of any such corporation or copartnership;" giving, therefore, a much wider range than in the case of an ordinary partnership, where you can only issue execution against those parties who were partners at the time that the contract, which is the subject-matter of the action, was made. And when we find by the next section, that the public officer in whose name any suit shall have been prosecuted or defended, and every person against whom execution upon any judgment obtained shall be issued, "shall always be reimbursed, and fully indemnified, for all loss, damage, costs, and charges,

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(a) 1 *Wms. Saund.* 291. a.

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without deduction, which any such officer or person may have incurred by reason of such execution, out of the funds of such copartnership, or, in failure thereof, by contribution from the other members of such copartnership, as in ordinary cases of such copartnership;" that provision shews that there is an ample remedy for parties proceeded against, without other persons being brought in by a plea of abatement. The object of the act was to enable a creditor to proceed against any member of the copartnership; and he cannot be compelled, when he has brought one party before the court, to proceed against the others. Consequently, the plea in abatement being taken away in the original action, it is virtually taken on the *scire facias*.

BOSANQUET J. The objection taken by this demurrer is, that the *scire facias* being against fifteen persons, the plaintiffs have declared against twelve only. This may be an irregularity, but it does not necessarily constitute a ground of demurrer. On the contrary, the presumption is that it does not. It is said, however, as the defect appears on the record, that advantage may be taken of it by demurrer. But it has been properly answered by the Lord Chief Justice, that the objection is *not* disclosed on the record; for it does not appear that the three parties who are not declared against were alive at the time of declaring, and if not, then the defendant could not, by a plea in abatement, give the plaintiffs a better writ. I also agree that the statute of the 7 G. 4. c. 46. never contemplated that parties proceeded against under the act, should have a plea in abatement. The object of the statute was to enable a plaintiff who had obtained judgment against the public officer, to proceed against any one or more of the members of the company as he thought proper, but not that the parties sued should have the power of pleading in abatement

the nonjoinder of the rest. The fourteenth section, which provides for the reimbursement of those sued, seems to me decisive upon this point.

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COLTMAN J. It is clear, by the admission of my brother *Channell*, that unless he could support a plea in abatement to the declaration, he cannot succeed upon this demurrer. In a plea of abatement it must be stated that the parties whose nonjoinder is complained of are alive and within the jurisdiction of the court. Here, there is nothing to shew that the three persons were alive at the time of the return, and of the declaration. As to the other point it is not necessary to say much; but it may be observed that the defendants here stand in a different situation from parties who have entered into a recognizance of bail, or a joint and several contract. There the plaintiff may proceed either jointly, against them all, or against each, separately. Should he proceed against them jointly, he cannot have execution against one, without bringing the others before the court. But by the thirteenth section of this act, a plaintiff may issue execution against one or more of the company, which shews that the legislature intended that you should not be bound to treat the contract as a joint contract, against all, or a separate contract, against each.

ERSKINE J. The argument on the part of this defendant has proceeded entirely on the assumption that the plaintiffs have stated sufficient on the record to support a plea in abatement. The answer is twofold — first, that it does not appear on the face of the record that the three parties were alive and within the jurisdiction of the court; and, secondly, that it was not the intention of the legislature to allow of a plea of abatement in any proceeding under the statute. An action

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RICKERBY. is given against the public officer of the company, in order to relieve a plaintiff from the necessity of suing all the members of the copartnership; and although the courts have held it necessary to proceed by *scire facias*, they never could have meant that thereby all the evils should be introduced which it was the intention of the legislature to avoid. The object of the act, in saying that execution might be issued against any one or more of the members of the company, or against any one who had been a member, was, to give a plaintiff the power of selecting any members against whom to proceed that he might think proper, leaving them to be reimbursed in the manner provided by the act.

Judgment for the plaintiffs.

Plea by the defendants *Thomas Rickerby, John Johnson, James Walkworth, James Wallworth the younger, Robert Field, John Bennett, and Joseph Bennett*, that execution ought not to be adjudged to the said *Sarah Fowler, John Gaunt, and Matthew Gaunt*, according to the force, form, and effect of the said recovery, because they say that, *at the time of the said recovery*, the said *William Marston* was not one of the public officers of the said persons united in copartnership, in manner and form &c.; concluding to the country.

The defendant *Little* pleaded a similar plea.

Special demurrer to each of these pleas, assigning for causes;—that the present action, being merely for the purpose of enabling the parties sued herein to shew cause why the said *Sarah Fowler, &c.*, should not have execution on the judgment obtained against the said *William Marston* as such public officer as aforesaid, the said *Thomas Rickerby, &c.*, are precluded from pleading any matter in this action which might have been pleaded in the action in which the judgment was so recovered as aforesaid; and it is,

therefore, inadmissible for them to say that the said *W. Marston* was not one of the public officers of the said copartnership at the time of the said recovery, that act being pleadable in the said original action against the said *Marston* as such officer as aforesaid; also that this action being merely for the purpose aforesaid, they are precluded from pleading any matter which would have been admissible as a defence in the action in which the said judgment was so recovered as aforesaid, without shewing, and stating, in the plea some good and sufficient reason why, and on account of which, the said matter was not or could not be so pleaded in the said original action against the said *Marston* as such public officer of the said copartnership, as aforesaid; and, therefore, that it is inadmissible for them to say in their said plea, that the said *Marston* was not one of the public officers of the said copartnership, *at the time of the said recovery*, without stating and shewing in their said plea some good and sufficient reason why, or on account of which, such matter was not or could not be pleaded in the said original action, &c.; also that the plea tends to raise an issue immaterial to the merits of the present action, in this, to wit, that the same admits, and does not deny, that the said *Marston* was a public officer of the said copartnership *at the commencement of the said original action*, and that being so, it is immaterial whether he continued to be such public officer *at the time of the said recovery*. That if it were material that the said *Marston* should continue to be such public officer at the time of the said recovery, the facts why, and by reason of which, it was so material, should have been stated and shewn to the court in and by the plea; that the plea traverses and attempts to put in issue a fact not alleged in the declaration, to wit, whether the said *Marston* was a public officer of the said copartnership *at the time of the said recovery*, it

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being in no part of the declaration alleged or averred, that the said *Marston* was a public officer of the said copartnership *at the time of the said recovery*; but the declaration merely reciting the *scire facias* in this action, in which that fact is stated and alleged; that the plea attempts to refer the question, whether the said *Mars-ton* was a public officer of the said copartnership, at the time of the said recovery, to the decision of a jury, whereas such question should not be left to a jury; and that the plea should not have concluded to the country, but to the record, and with a verification, &c.

Joinder in demurrer.

Stephen Serjt. in support of the demurrer. The first objection to this plea is in point of form, inasmuch as it improperly concludes to the country. The plea traverses a matter not alleged in the declaration, for the statement in the *scire facias*, that *Marston* is one of the public officers of the company is mere recital, on which no issue can be raised or taken. [*Tindal C. J.* You contend that the proper plea would have been *null tiel record.*] Yes. No plea can be pleaded in *scire facias* which might have been pleaded, as this plea might, to the original action (a). And this rule is not confined to cases where the defendant might have availed himself of the defence, but applies to every case in which the defence might have been pleaded by any one. In *Com. Dig. Pleader* (3 L. 13.), it is laid down, that “if there be a *scire facias* against an heir, or terretenants, after judgment against the ancestor, he shall not plead any matter in avoidance of the judgment, though the judgment was by *nil dicit.*” (b) The true principle is that you cannot contradict the record, or shew that the original judgment was erroneous. *Baylis v. Hayward* (c)

(a) 2 *Wms. Saund.* 72 t. n.

(b) Citing *Sav.* 25., which is probably a misprint, as no

such case is to be found in *Savile.*

(c) 4 *A. & E.* 256.; 5 *N. & M.* 613.

is a conclusive authority on this point. There, to *scire facias* upon a judgment in assumpsit by the original plaintiff, the defendant pleaded the plaintiff's bankruptcy, assignment, &c., and that the causes of action in the original suit accrued before the plaintiff became bankrupt. On special demurrer, for that the plea did not shew whether the judgment was recovered before or after the bankruptcy; it was held that the plea was bad, inasmuch as it did not appear but that the bankruptcy might have been pleaded in bar of the original action. *Patteson J.*, after referring to the averments of the plea, there says, "All this may be true, and yet the bankruptcy may have been before the commencement of the original action, and of course before the judgment. If it were so, the defendant might have pleaded the facts to the original action; and there is no rule clearer than this, that whatever can be so pleaded, cannot be pleaded to the *scire facias*." Here, it is obvious that the defendants, under this plea, might shew that *Marston* was not a public officer at the time of the judgment recovered, or at the time of action brought, or that he never was a public officer at all, the whole of which defences might have been set up to the original action. Whether these defendants might have pleaded that *Marston* had *ceased* to be the public officer of the company, and whether such a plea would have been good, is not the question.

Channell Serjt. in support of the plea. It may be admitted, that a defendant who was a party to the original action cannot set up any defence to a *scire facias*, which he might have pleaded to such action. It may also be conceded, that a defendant sued on a *scire facias* as an executor, heir, or terre-tenant, is precluded from pleading any matter shewing that the party whom he represents was not liable to the judgment recovered.

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It would, however, lead to most mischievous consequences if defendants, who are sought to be made responsible by reason of judgments recovered against a public officer, are not to be at liberty to contend that the party sued in the original action, was not the public officer of the company. Supposing the original judgment to have been obtained by collusion, or the public officer to have been discharged, and to have suffered judgment by default, are not the members of the copartnership to be allowed, in some way or another, an opportunity of denying that the party was such public officer? If this were not so, every member would be at the mercy of a plaintiff, who chose to sue another person and call him a public officer. [*Tindal* C. J. The fourth section of the act requires the names of the public officers to be registered, so that the public may know who are the proper parties to sue. If this had been a collusive judgment, should you not have applied to the court? If the members of a company mean to attack a judgment recovered against a public officer whom they themselves have sanctioned, this is not the proper course to take.] In order to make the defendants liable, the judgment must be recovered against a party who was the public officer at the time, *Harwood v. Law*. (a) If the members are only liable on a judgment recovered against the public officer for the time being, they surely have a right, by plea, to deny that the party was the public officer at the time when the judgment was obtained. Here, the plea denies that *Marston* was the public officer at the time of the recovery of the judgment; and that is an issue properly taken on the declaration, which virtually contains an allegation that *Marston* was the public officer at the time of the judgment obtained. If that be so, then the plea properly concludes to the country

(a) 7 M. & W. 208.

instead of with a verification. The *Edinburgh, Leith, and Newhaven Railway Company v. Hibblewhite* (a) is a direct authority upon this point. [Tindal C. J. If there had been any real ground for such a charge, it would not have been difficult to frame a plea alleging that the judgment had been obtained by fraud and collusion between the plaintiffs and *Marston*. That would have been an answer to the declaration, for fraud vitiates every thing; and to such a plea the plaintiffs might have replied; as it is, you call on the court to assume a case of fraud, which the other side have no opportunity of answering.]

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Stephen Serjt. in reply. It may be conceded, that matter necessarily implied, may be traversed as well as what is expressly alleged, and that the plea must conclude to the country. But here there is no allegation in the declaration, either express or implied, of *Marston* being the public officer at the time of judgment recovered. The declaration merely recites the judgment, and opens no question of fact whatever. The plaintiffs rely on the record, and the point is, whether the defendants may plead to that fact, and conclude to the country. But the plea is defective in substance. It admits the defendants to be members of the company, and that *Marston* was the public officer when the action was commenced; for the allegation in the plea is confined to the time of judgment recovered. The argument on the other side merely amounts to this, that a case may occur in which it would be a hardship, if a defendant was not at liberty to plead that the party was not the public officer. But this is not a case of that sort, and if it had been, relief might, as has been suggested, have been obtained by an application to the court. The

(a) 6 M. & W. 707., 8 Dowl. P. C. 802.

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plea, at all events, should have averred that *Marston* never was the public officer of the company.

TINDAL C. J. The question is not whether or not a good plea might not have been framed, denying the official character of the public officer of the company; for, at all events, this plea is bad. The declaration commences by setting out a judgment recovered against *Marston*, one of the public officers for the time being of the copartnership, without alleging distinctly the fact that he was one of the public officers at the time of recovering the judgment. The plea is, that at the time of the said recovery, *Marston* was not one of the public officers of the said copartnership, in manner and form as the plaintiffs had alleged, concluding to the country. It therefore contains a direct denial of that which is neither expressly stated in the declaration, nor necessarily to be implied. But there is a distinct allegation in the declaration, that *Marston* was the duly appointed and registered public officer, and was sued for and on behalf of the company; and that is not denied. The plea consequently admits that *Marston* was duly appointed one of the public officers, and was sued in that capacity. That being so, unless the defendants shew, by some distinct allegation, that the original character of *Marston* has determined, we must assume that it continues. If it be intended by the plea to allege that *Marston* has ceased to be one of the public officers, that is new matter, and the plea should have concluded with a verification. I am therefore of opinion that this plea is bad for concluding to the country, and that our judgment must be for the plaintiffs.

BOSANQUET J. I also am of opinion that this plea is bad, as it sets up new matter, and concludes to the country instead of concluding with a verification.

COLTMAN J. I also think that this plea is insufficient. It is a very different plea from one alleging that *Marston* never was a public officer, although I am not prepared to say what the effect of such a plea would be. Here, the plea merely alleges that at the time of judgment recovered *Marston* was not a public officer of the copartnership; which, by implication, admits that he was a public officer at some previous time; and it seems to me that the defendants have not stated sufficient to relieve them from being responsible for *Marston's* acts.

ERSKINE J. It being admitted on the plea, that *Marston* was duly appointed one of the public officers of the company, if the defendants meant to rely on the fact that he had ceased to be such officer, they should have averred it distinctly, and have concluded with a verification, and not to the country. (a)

Judgment for the plaintiffs. (b)

(a) The new matter whereby *Marston* had ceased to be a public officer, would have been some positive act of renunciation or dismissal; and would therefore, as being a new *affirmative* allegation, have required a verification as well as a conclusion, express or implied, to the court. See *Bodenham v. Hill*, 7 M. & W. 274., 8 Dowl. P. C. 862., *antè*, Vol. I. 754.

(b) As to the alteration of

the practice by original upon the refusal of the courts, by rule of 1654, to grantoyer of the original writ, and thereby to enable the defendant to take advantage of a variance between the writ and the declaration, by plea in abatement, demurrer, motion in arrest of judgment, or writ of error; see 1 Wms. Saund. 318 n., 5 N. & M. 194.

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April 30. ELIZABETH LEY, Widow, and EDWIN LEY v.
ELEANOR SUSAN LEY and JOHN MORGAN
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A testator devised his freehold, duchy or copyhold, and leasehold estates to his widow and his youngest son, upon trust to permit his widow to receive the rents and profits for life, should she

DOCTOR HUGH LEY of *Penzance*, in the county of *Cornwall*, was at the date of his will hereinafter mentioned, and at his death, entitled in fee to divers shares in several tin and copper mines, situate in the parish of *St. Agnes*, in the said county. He was also, at the time aforesaid, seised in fee-simple of one full undivided third part of certain freehold lands and hereditaments, situate in the several parishes of *St. Agnes* aforesaid, and *Perranzabuloe*, in the borough of *Penryn*, in the said county, subject only to certain chief rents in respect of the same. He had also, at the time aforesaid,

remain unmarried, and from and after the decease or future marriage of his widow, then as to all his freehold and duchy or copyhold and leasehold estates, to the use of his three sons, to be equally divided between them as tenants in common for ever; and he declared his further will to be, that if at any time within three years next after the decease or future marriage of his widow, his eldest son *Hugh* should be desirous to have the whole of the estates before devised unto and among him and his brothers, upon his paying 1000*l.* to each of them within that period for such their shares and interest therein, the same should become the sole and exclusive property of such eldest son. And after giving certain legacies to the testator's daughters, which, with debts, were charged upon his freehold property in the event of the personalty being insufficient, the will proceeded: — "I further direct that should my eldest son die without issue, then I give and devise unto my second son *John Morgan* all those my freehold and duchy or copyhold estates aforesaid; and in case he should have no issue, then to my youngest son *Edwin* and his issue, his heirs, and assigns for ever."

The eldest son died intestate and without issue, leaving his mother, still unmarried, and his two brothers, him surviving, and without having exercised the option of purchase given him by the will.

Held, that the eldest son died seised of the remainder in fee of one third part of the freehold and duchy or copyhold lands devised by the testator's will, expectant on the death or second marriage of his mother; and that he died possessed of the absolute estate in remainder in one third part of the leasehold estates devised by the said will, expectant on the death or second marriage of his mother.

an estate in fee-simple in the entirety of certain duchy or copyhold lands and hereditaments according to the custom of the manor of *Moresk*, of which the same were holden, situate in the parish of *St. Erme*, in the said county. Lastly, he was possessed at the time of his death of a share in certain leasehold houses and premises for years determinable on lives, situate in the borough of *Truro* in the said county, and in the parish of *Ludgoan* in the said county of *Cornwall*.

By his last will and testament in writing, bearing date the 1st of *July* 1825, and properly executed and attested to pass real estates, after directing the expenses of his funeral and just debts to be paid by his executors out of his personal estate, the said *Dr. Hugh Ley* gave and devised unto his wife *Elizabeth Ley*, and their youngest son *Edwin Ley*, and to the survivor of them, all those his several freehold, and duchy or copyhold, and leasehold estates, lands, and tenements in the said county of *Cornwall*, and all other his real and personal estate and effects of every kind and wheresoever situate, as well in possession as otherwise, that might belong to him at his decease, except only such thereof as he might thereafter dispose of in a different manner: To hold the same, with the appurtenances, unto the said *Elizabeth Ley* and *Edwin Ley*, and the survivor of them, and the heirs, executors, and administrators of such survivor, according to the respective natures of the several premises; upon trust, in the first place to permit and suffer his said wife *Elizabeth Ley* to have, receive, and take the yearly and other income, interests, rents, proceeds, and profits thereof during her natural life, in case she should so long remain his widow and unmarried to any other husband, to and for the maintenance and support of herself and their (the said testator's and the said *Elizabeth Ley's*), several daughters, for the time being, unmarried; and from and after the decease, or future marriage,

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which should first happen, of his said wife then (subject to the reservations and charges thereafter contained), as to all his freehold, and duchy or copyhold, and leasehold estates for and for the only use and benefit of his the said testator's three sons, *Hugh Ley*, *John Morgan Ley*, and *Edwin Ley*, to be equally divided between them, as tenants in common, and to their respective heirs, executors, and administrators, according to the natures of the same premises, for ever, or during all other his estate and interest therein respectively; but nevertheless the said testator directed, that in case of the future marriage of his wife, and she should again become a widow, the yearly and other rents and profits of his said duchy or copyhold estate of *Trevorgan Vean*, or by whatsoever name the same might be called, and situated in the parish of *St. Erme* aforesaid, and parcel of the manor of *Moresk*, in the county of *Cornwall* aforesaid, should and might, from thenceforth during the remainder of her life, belong and be paid to her own use and benefit: and his further will was, that if at any time within the space of three years next after the decease or future marriage of his said wife, which should first happen, his said eldest son *Hugh Ley* should be minded or be desirous to have the whole of the several estates before given and devised unto and among him and his said brothers, then the said testator directed that, upon his paying the sum of 1000*l.* sterling (clear of all deductions) unto each of his said brothers *John Morgan Ley* and *Edwin Ley*, within that period, for such their shares and interest therein, the same estates, shares, and interests should thereupon be and become the sole and exclusive property of his said son *Hugh Ley*, according to the respective natures thereof, for ever, but subject and chargeable in other respects as aforesaid; and the said testator after giving five legacies of 1500*l.* to each of his daughters to be paid after the decease or future marriage of his said

wife, which should first happen, further directed that in case his personal estate should prove insufficient for the payment of his debts and the aforesaid five legacies of 1500*l.*, when the same should respectively become payable, then his will was, that his freehold property should be chargeable therewith, and subject to the deficiency either by sale or mortgage as his trustees should deem fit; and in the mean time, that is to say from the time or times at which such legacies should respectively become payable as aforesaid, and be actually paid, that interest at the rate of 4*l.* for every 100*l.* by the year should from time to time be paid for such deficiency: and the said testator directed that 50*l.* out of every 100*l.* which should be received as dues for his mines should, from time to time as the same should be received, be laid out or invested at interest on the same securities as the other property for the use and benefit of his said wife and children: and he further directed that out of all dividends or profits arising from any adventure or adventures in mining which he might be concerned in at his decease a like sum of 50*l.* out of every 100*l.* so received should be appropriated and laid out on the same securities, and for the same purposes and intents as the other property; and directed that in case it should be thought best for the interest of his family that the same should be sold, the money arising therefrom should be laid out on the same securities and added to his personal estate, and should be applied to the payment of the aforesaid legacies at the decease or future marriage of his wife, and if any surplus should remain after the aforesaid five legacies of 1500*l.* to each of his five daughters were paid, then the said testator further directed that such overplus should be applied to the increasing such legacies to 2000*l.* each; and if after this there should be a further overplus, which from the then state of his mines and adventures was possible, then his

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will was that such overplus should be applied to the increasing of the legacies to his two sons *John Morgan* and *Edwin* to 1500*l.* each; and that what might afterwards remain, the said testator directed might be divided among his three sons *Hugh*, *John Morgan*, and *Edwin Ley*, share and share alike, and the said will then proceeded as follows:—“I further direct that should my eldest son die without issue (born in wedlock), then I give and devise unto my second son *John Morgan Ley*, all those my freehold and duchy or copyhold estates aforesaid, and in case he should have no issue (born in wedlock), then to my youngest son *Edwin Ley* and his issue (born in wedlock), his heirs, and assigns for ever. Lastly, I leave my eldest son *Hugh Ley* residuary legatee of whatever property I may have omitted to bequeath, after the decease of my wife.” And the said testator gave and bequeathed unto his said wife *Elizabeth Ley*, for her own use and benefit, all the rest, residue, and remainder of his personal estate and effects, and appointed her sole executrix of his said will.

The testator died on the 3d of *August* 1826, without having altered or revoked his said will, leaving his three sons the said *Hugh Ley*, *John Morgan Ley*, and *Edwin Ley*, and also his said wife *Elizabeth Ley*, him surviving: and his personal estate was sufficient to discharge all the charges and legacies, to which, if the said testator's personal estate had been insufficient, his real estate was made subject; and all the said legacies and charges were in fact paid and satisfied in the lifetime of the testator's eldest son *Hugh Ley*.

The testator's eldest son *Hugh Ley* died on the 24th of *January* 1837, intestate and without having ever had any issue, leaving his brothers *John Morgan Ley* and *Edwin Ley*, and also his mother *Elizabeth Ley* (who is still a widow), him surviving.

On or about the 11th of *March* 1837, the said

Elizabeth Ley widow, and *Edwin Ley* as bond creditors of the said *Hugh Ley* the intestate, on behalf of themselves and all the other creditors of the said *Hugh Ley*, filed their bill of complaint in the High Court of Chancery against *Eleanor Ley* (the widow and administratrix of the said *Hugh Ley*), and the said *John Morgan Ley*, praying that an account might be taken by and under the decree and direction of the said court, of what was due and owing to the said complainants in respect of their said debts, and the interest upon the same, and of the several debts due to the other creditors of the said intestate; and that his personal estate and effects, and (in case of a deficiency thereof) his reversionary interest in remainder expectant upon the decease or second marriage of the said complainant *Elizabeth Ley*, in the said real, and duchy or copyhold, estates of the testator *Dr. Hugh Ley*, might be applied in payment of his said debts, in a due course of administration.

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The cause having come on to be heard upon further directions, and upon exceptions to the master's report before the Vice-Chancellor, on the 28th of *February* 1840, his Honor ordered that a case should be stated for the opinion of this court; and that the questions should be, —

First, — whether (in the events that had happened) the said intestate, *Hugh Ley*, under and by virtue of the said will of the said testator, *Dr. Ley*, died seised of any freehold, and duchy or copyhold, estates, or of any, and what, estate or interest therein.

Secondly, — whether (in the events that had happened) the said intestate *Hugh Ley*, under and by virtue of the said will of the said testator *Dr. Ley*, died possessed of any leasehold estates, or of any and what estate or interest therein.

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Stephen Serjt. (Collins was with him) (a) for the plaintiffs. Under the will of his father Dr. Ley, Hugh Ley clearly took, and died seised of, a remainder in fee, in one-third part of the freehold, and duchy or copyhold, lands, expectant upon the death or second marriage of his mother, as tenant in common with his two brothers, subject only as to the duchy or copyhold estate of Trevorgan Vean, to the contingent life estate of his mother, in the event of her marrying and becoming again a widow. In like manner the intestate took, and died possessed of, an absolute estate in remainder in one-third part of the leaseholds, subject to his mother's life estate therein during her widowhood. The intestate, as the eldest son, has the privilege given to him of purchasing the whole of the estates, and, in the event of his doing so (but in that event only), the testator, by the ultimate devise in the will, gives his two younger sons a chance of succeeding to the freehold, and duchy or copyhold, lands. Browne v. Jervcs (b), was very similar to the present case. "William Browne being seised in fee of lands in Reculver, Edginton, and Ham, holden in socage, having issue a son John Browne and two daughters, and having a brother Roger Browne, who had issue three sons, viz. Henry, Matthew, and William, devised all his lands to John his son, and his heirs; and if he die without issue, he de-

(a) The case was first argued in *Michaelmas* term, 1840, when, in order to avoid the difficulty the court might have in certifying should they be of opinion that the trustees under the will took the legal estate, the case was adjourned to give the parties an opportunity of restating the questions. It was ultimately agreed that, for all the purposes of the argument, the case should stand

as stated, but that in the event of the court being of opinion that Dr. *Hugh Ley*, the intestate, died seised of an estate or interest, they should be at liberty in the certificate to assume a conveyance by which the legal had become united with the equitable estate.

(b) *Cro. Jac.* 290. And see *Wallop v. Darby. Yelv.* 209., which appears to be a subsequent case upon the same will.

vised his lands in *Reculver*, to *Matthew*, his nephew, in fee; "Item, I devise my lands in *Ham*, to *Henry*, my nephew, in fee." And the question was, whether that were a good devise to *Henry Browne* by way of remainder after the death of *John* without issue, or an immediate devise to *Henry*, and a countermand of the devise to *John* as to those lands; for *John* devised those lands, and died without issue; and between the devisee and *Henry* was the question. And it was resolved, that it was a limitation by way of remainder to *Henry*, and no countermand; for the words "Item, I devise, &c." shall be construed that if *John* die without issue, then the land should remain as the devise was made to *Matthew*; and the first limitation to *John* is, as to him and his heirs of his body, and no fee; and so all the clauses of the will stand together." Here, the ultimate devise of the entirety of the freehold, and duchy or copyhold, land, is connected with, and is not opposed to, the former devise: and it is the duty of the court to reconcile them, if possible. [*Coltman J.* You would read the ultimate devise as if it had contained the words "in case my eldest son shall make his election to purchase my whole estates."] That is one way of putting the point. Many cases may be cited in which the courts have introduced words into a will in order to effectuate the testator's intention. Although words cannot be introduced to disturb a precedent meaning which is clearly expressed, you may do so in order to clear up that which is obscure. [*Tindal C. J.* If the ultimate devise cannot apply unless the eldest son made his election, there is no occasion to introduce any words into it.] The argument on the other side will probably be, that the clauses in question are irreconcilable, and that this is a case of repugnancy. There are, however, many authorities establishing the proposition, that where there is a clear general intention

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apparent on the face of a will, and in a subsequent part of the will, words occur not reconcilable with that which has gone before, the courts will reject such words in order to carry into effect the manifest intention of the testator. *Green v. Armsteed* (a), *The Countess of Bridgewater v. The Duke of Bolton* (b), *Adams v. Clerke* (c), *Holdfast dem. Hitchcock v. Pardoe* (d), *Constantine v. Constantine* (e), and *Doe dem. Spencer v. Pedley*. (g)

With respect to the question, whether *Hugh Ley* took a legal or an equitable estate, the devise is to the widow of the testator and the youngest son, upon trust to permit the former to receive the rents during her life, in case she should remain unmarried, and after her decease or second marriage, for the use and benefit of his three sons as tenants in common. This is clearly a limitation of a legal estate to the widow during her widowhood, with remainder to the sons in fee. The general rule is, that where there is something to be done by the trustees they take the legal estate; *Jeffreson v. Morton*. (h) Here, assuming, that the legal estate would not vest in the trustees independently of the contingent charge of the testator's debts and legacies, that circumstance will make no difference; first, because it is stated, as a fact in the case, that the personal estate was sufficient to discharge such debts and legacies; and, secondly, because where, but for such an authority in the trustees, the legal estate would clearly pass to the devisees, the court will construe the words of the clause, not as words of limitation, clothing the trustees with the legal estate, but simply as giving them a power. See *Hawker v. Hawker*. (i) [Tindal C. J.

(a) *Hob.* 65.(b) 6 *Mod.* 106. 112.(c) 9 *Mod.* 154.(d) 2 *W. Bla.* 975.(e) 6 *Ves.* 100.(g) *Tyrolh. & G.* 882., 1 *M. & W.* 662.(h) 2 *Wms. Saund.* 11 c.(i) 3 *B. & Ald.* 537.

The question, whether *Hugh Ley* took a legal or an equitable estate, does not go to the merits of the case.]

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Channell Serjt. (*Cole* was with him) for the defendant *John Morgan Ley*. It is understood that the point for consideration is, what beneficial interest *Hugh Ley* took under the will, without determining whether such interest was a legal or an equitable estate. It is submitted, that *Hugh Ley* did not die seised of any estate in the testator's freehold, and duchy or copyhold, lands, or in the leasehold; and that if he did die seised of one-third thereof, it was subject to be divested, as to the freehold, and duchy or copyhold, lands, by the exercise, by *John Morgan Ley* the second son, of the option given to *Hugh Ley*, of buying the whole of the estates, on payment of 1000*l.* to the representatives of the latter. There is nothing in the will to shew that the testator contemplated the death of his eldest son in his widow's lifetime. The first devise of the testator's property, if the will had stopped there, would have been free from doubt. The ultimate devise, if read by itself, is equally unambiguous; and the effect of such ultimate clause is, to give an estate-tail to the second son, in the event of the eldest son dying without issue. [*Coltman* J. Do you say that the last devise cuts down the eldest son's estate to an estate tail?] The testator, in case of the event happening, which has happened, has revoked the first devise. [*Erskine* J. That would deprive the youngest son of all interest in the estate.] The rule is apprehended to be, that although the exposition of a will must be gathered from every part of it, yet, where there is no connection between different clauses or common interest, those clauses, if perfectly unambiguous, must be taken separately. It has been argued, that there is an implied, though necessary, connection between the clause giving the eldest son the option to

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purchase, and the ultimate devise, and that the difficulty, which would otherwise arise on the latter, is removed by taking the two clauses together. Assuming that to be so, the ultimate devise will at all events operate so as to pass to the second son the third part, which would otherwise have vested in the representatives of the eldest son. Whether *Hugh Ley* was content with his original one-third, or exercised his option to purchase the whole, it is clear that he must have had a fee in the one-third or in the whole; which shews the impossibility of reconciling the first and last devises. [*Tindal* C. J. The difficulty in the way of my brother *Stephen's* construction, is, that it is singular, if *Hugh Ley* lays out 2000*l.*, the testator should go on and still treat the estate as his own.] The intention of the testator evidently was, not only to provide for each of the sons, but to keep the estates entire in one of them; and such intention will be best effectuated by holding that, under the ultimate devise, the share of the eldest son passed to the second son, or that the latter might take the whole, he exercising the same option as was given to the eldest. [*Tindal* C. J. The will does not give the right of option to the second son.] If the court can gather that such was the intent, no violence will be done to the construction of the will, in holding the option to extend to the second son. It is impossible to put any construction on the will, which will give effect to every part of it.

Stephen Serjt. shortly replied.

Manning Serjt. appeared for *Hugh Ley's* widow; but the court declined hearing any separate argument in respect of her interest.

The court afterwards sent the following certificate to the Vice-Chancellor: —

“ This case has been argued before us by counsel, and we have considered the same; and — assuming that the interest which passed to the intestate, *Hugh Ley*, in the several freehold, and duchy or copyhold, and leasehold, estates referred to, was a legal, and not merely an equitable, interest —

“ We are of opinion, that in the events that had happened, the said intestate *Hugh Ley*, under and by virtue of the said will of the testator, *Dr. Ley*, died seised of the remainder in fee of one third part of the *freehold, and duchy or copyhold*, land, devised by the said will, expectant on the death, or second marriage, of *Elizabeth Ley*, the widow of the said testator, subject, as to the duchy or copyhold (a) estate of *Trevorgan Vean*, to the contingent interest of the said *Elizabeth Ley* therein, in case of her future marriage, and of her again becoming a widow.

“ And that, in the events that had happened, the said intestate, *Hugh Ley*, under and by virtue of the said will of the said testator, *Dr. Ley*, died possessed of the absolute estate in remainder, in one third part of the leasehold estates devised by the said will, expectant on the death, or second marriage, of the said *Elizabeth Ley*.

“ *April 30th, 1841.*

“ N. C. TINDAL.

“ J. B. BOSANQUET.

“ T. COLTMAN.

“ T. ERSKINE.”

(a) The lands called in this case “ duchy or copyhold,” are lands of the conventional, or customary hereditary leasehold, tenure, existing in the assessionable manors of the duchy of *Cornwall*; the nature and the incidents of which formed the subject of inquiry in *Rowe v. Brenton*, 3 *Mann. & Ryl.* 133—364., 449—532. *S. C.* 8 *B.*

& *C.* 737—766.; and see 2 *Abbrev. Rot. Orig. in Scaccario*, 109 a.; *Skelton v. Starke*, Co. *Entr.* 293., 3 *Mann. & R.* 449.; *Mann. Exch. Prac. Revenue Branch*, 356.

As to the assessionable manor of *Moresk*, see 1 *Abbrev. Rot. Orig.* 128 b.; 3 *Mann. & R.* 128. 141, 142. 188. 233. 233. n. 259. 473. 476.

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Reversed on Error - Hilary 1842

May 8. WILMSHURST and Another v. BOWKER and Another.

The plaintiffs bought a quantity of wheat of the defendants, under the following contract:—

“Sold the 25th of October 1836, to Messrs. J. W. and son, about 300 quarters of wheat, as per

sample, at 51s. per quarter on board. Payment by bankers' draft on *London*, at two months' date, to be remitted on receipt of invoice and bill of lading.” On the 27th of *October* the wheat was put on board of a general ship, under a bill of lading, by which it was made deliverable “to order or assigns, he or they paying freight, &c.” The defendants caused an insurance to be effected on the wheat by their agents, which insurance was forwarded to the plaintiffs, in pursuance of an arrangement with the plaintiffs, whereby they were to charge them the premium, in addition to the cost price of the wheat. The defendants sent the plaintiffs the bill of lading indorsed generally, and an invoice, stating the wheat to be shipped by order, and *for the account and risk, of the plaintiffs*. Upon the receipt of the invoice and bill of lading, the plaintiffs, instead of a bankers' draft on *London*, transmitted to the defendants their own acceptance for the invoice price of the wheat, and the cost of the insurance, which the defendants immediately returned, informing the plaintiffs by letter that such acceptance was contrary to agreement, and that they had arranged otherwise for the disposal of the cargo, which they obtained back from the captain of the vessel and resold.

Held, that although the *property* in the wheat passed to the vendees under the contract, the right to the *possession* was not to vest until they remitted to the vendors a bankers' draft on *London* in payment, and that the vendees having failed to comply with that condition, the vendors were justified in preventing the delivery of the wheat.

(a) The declaration also contained a count in trover, the pleadings connected with which came before the court on demurrer in *Hilary* term, 1839. Judgment was given for the

defendants on the ground that the plaintiff had not such a right of possession to the wheat as would entitle them to maintain trover. See 5 *New Cases*, 541., 7 *Scott*, 561.

shipped and loaded, and the same was then shipped and loaded, in and on board of a certain ship or vessel then lying at and in the port of *Lynn*, in the county of *Norfolk*, to wit, a certain ship or vessel called *The Ramsgate*, of which one *Lightowler* was then the master and commander, to be carried and conveyed in and on board the said ship or vessel, from *Lynn* aforesaid to *Maidstone* in the county of *Kent*, for the account and at the risk of the plaintiffs, and there, to wit, at *Maidstone* aforesaid, to be delivered to the plaintiffs; and the defendants then parted with the possession of the said wheat, and delivered the same out of their possession to the said *Lightowler*, in and on board of the said ship or vessel; and the said *Lightowler* then received the said wheat, and had the possession of the same, for the purposes aforesaid. That afterwards, and after the delivery of the said wheat to the said *Lightowler*, so being such master and commander of the said ship or vessel as aforesaid, and before the commencement of the suit, to wit, on the day and year last aforesaid, he, the said *Lightowler*, then having the possession of the said wheat in and board of his ship or vessel, as such master and commander of the said ship or vessel, made a certain bill of lading, his own proper hand being thereunto subscribed, and thereby then acknowledged the shipping, and delivery to him, the said *Lightowler*, of the said wheat in and on board of the said ship or vessel, and undertook, on the arrival of the said ship or vessel at *Maidstone* aforesaid, to deliver the said wheat to the order of the defendants; and the said *Lightowler* then delivered the said bill of lading to the defendants, and the defendants then indorsed the same to the plaintiffs; and the defendants then also made a certain invoice of the said wheat, their own proper hands being thereunto subscribed, and thereby and thereon expressed and declared the said wheat to be shipped in and on

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board the said ship or vessel, *Lightowler* master, for *Maidstone*, by order and for the account and risk of the plaintiffs; and the defendants then also wrote and addressed to the plaintiffs a certain letter, their own proper hands being thereunto also subscribed, and in and by their said letter stated and expressed, and advised and informed the plaintiffs, that they, the defendants, then begged to hand them, the plaintiffs, the invoice and bill of lading, of the order of them the plaintiffs, of wheat (meaning the said invoice and bill of lading thereinbefore respectively mentioned), per Captain *Lightowler*, and thereby then also requested and directed the plaintiffs, that, to the amount of the same, they would please to add the charge for insuring the said wheat, and remit the same to them, the defendants, in due course; and the defendants then inclosed the said invoice and the said bill of lading, so by them indorsed to the plaintiffs as aforesaid, in the said letter, and then addressed, and sent and dispatched the said letter, with the said invoice and bill of lading therein inclosed to the plaintiffs; and the plaintiffs afterwards, to wit, on the day and year last aforesaid, received the said letter, and the said invoice, and the said bill of lading, so indorsed to them by the defendants as aforesaid, and then became and were, and thence hitherto had been and still were, the owners thereof respectively: of all which the defendants before and at the time of committing of the grievances by them, the defendants, as thereafter next mentioned, had notice. Nevertheless, the plaintiffs in fact said, that afterwards, and after the delivery of the said wheat in and on board of the said ship or vessel to the said *Lightowler*, so being master and commander thereof as aforesaid, for the account and at the risk of the plaintiffs as aforesaid, and after the sending by the defendants to the plaintiffs, of the said invoice and the said bill of lading, so in-

dorsed to the plaintiffs by the defendants as aforesaid, and before the commencement of the suit, to wit, on the day and year last aforesaid, the plaintiffs then being the holders of the said bill of lading, and *not being bankrupts or insolvents*, but being then lawfully entitled to have the said wheat delivered by the said *Lightowler* to them the plaintiffs, — they, the defendants, well knowing the premises, but contriving and intending to injure and defraud the plaintiffs, did not nor would suffer or permit the said wheat to be delivered to them the plaintiffs, but wrongfully and injuriously, without the licence or consent, and against the will, of the plaintiffs, then *revoked and rescinded the said sale of the said wheat to the plaintiffs, and then caused and procured the said wheat to be stopped in its passage to the plaintiffs,* and forthwith upon such stoppage, and without the plaintiffs having notice thereof, or of their intention so to do, hindered and prevented the same from being then or at any time afterwards delivered to the plaintiffs; whereby the plaintiffs then wholly lost the said wheat, and by reason and in consequence thereof, were then deprived of sundry great gains and profits which might and otherwise would have arisen and accrued to themselves by reselling the said wheat at a much higher and advanced price, as they otherwise might and would have done; and also by means of the said premises, after the sale of the said wheat to the plaintiffs, and the sending and delivery to, and the receipt by them, the plaintiffs, of the said invoice and bill of lading as aforesaid, to wit, on the day and year last aforesaid, and on divers days and times between that day and the commencement of the suit, the plaintiffs confiding in and expecting the delivery of the said wheat to them, the plaintiffs, made and entered into divers contracts and bargains with divers persons for the sale and delivery to them respectively, to wit, on the several

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days and times last aforesaid, of divers large portions of the said wheat, and especially with one *Bunyar* for the sale and delivery of divers, to wit, 200 quarters of the said wheat to him, the said *Bunyar*; and also with certain persons carrying on business as millers, under the style and firm of Messrs. *Boorman* and *Wild*, for the sale to them of divers, to wit, 200 other quarters of the said wheat; but by reason of the non-delivery of the same to the plaintiffs, the plaintiffs, for want of the same, afterwards, to wit, on the several days and times last aforesaid, were forced and obliged to break and violate their said contracts, and made default in the delivery to the said *Bunyar*, and to the said Messrs. *Boorman* and *Wild*, of a great part, to wit, 100 quarters each of the said wheat so sold to them respectively by the plaintiffs, whereby the said *Bunyar* and the said Messrs. *Boorman* and *Wild* then respectively sustained great loss, to wit, to the amount of 200*l.* each, which loss they, the plaintiffs, by reason of the premises, then became and were, and still are liable, and were and are called upon to pay and make good to the said *Bunyar* and the said Messrs. *B.* and *W.* respectively; and as to other part, to wit, 200 other quarters of the said wheat so sold to the said *Bunyar* and the said Messrs. *B.* and *W.* respectively, the plaintiffs, for the purpose of delivering the same to the said *Bunyar* and to the said Messrs. *B.* and *W.* according to their said contracts in that behalf, were then forced and obliged to buy, and did then buy the said last-mentioned quantity of wheat at a much higher price than that at which they had so bought the said wheat from the defendants as aforesaid; and were also then forced and obliged to deliver, and did then deliver to the said *Bunyar* and the said Messrs. *B.* and *W.*, divers large quantities of wheat, amounting, in the whole, to wit, to 200 quarters of much greater value, to wit, of the value of 800*l.* more than the value

of the same quantity of the said wheat so hindered and prevented by the defendants from being delivered to the plaintiffs as aforesaid, and which the plaintiffs would otherwise have delivered to the said *Bunyar* and the said Messrs. *B.* and *W.*; and the plaintiffs were thereby then put to great inconvenience and expense, and thereby then lost, and were deprived of divers other great gains and profits, and also thereby sustained great loss, to wit, to the amount of 1000*l.*

Pleas: first; not guilty. Secondly; that the plaintiffs did not bargain with the defendants to buy of them, nor did the defendants sell to the plaintiffs the said wheat in the declaration mentioned, at the said price in that behalf therein mentioned, in manner and form as the plaintiffs had in the first count of the declaration alleged; concluding to the country.

Thirdly; that upon the said 25th of *October*, 1836, in the first count mentioned, the plaintiffs bargained with the defendants to buy, and the defendants then sold to the plaintiffs, the said quantities of wheat in the said first count mentioned, at and for the price in that behalf in the said first count alleged, upon the terms and conditions for the payment thereof as follows; (that is to say), *that the payment thereof should be made by bankers' draft on London at two months' date, to be remitted by the plaintiffs to the defendants upon receipt by the plaintiffs of the invoice and bill of lading*, and the defendants then caused the said wheat to be shipped on board of the said ship or vessel, and the possession thereof to be delivered to the said master and commander in pursuance of the said bargain, to be by him carried to *Maidstone* in the county of *Kent*, and to be then delivered to the plaintiffs *according to the said agreement, and the terms and conditions thereof*; that the plaintiffs upon the day and year in that behalf in the said first count alleged, and before the committing of the said supposed griev-

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ances in that count mentioned, received the said invoice and bill of lading as in the said declaration alleged, *but that the plaintiffs did not, nor would upon the receipt of the said invoice and bill of lading remit or tender, or offer to remit to the defendants any bankers' draft on London for the payment of the price of the said wheat,* but, on receipt of the said invoice and bill of lading, wholly failed and neglected so to do, contrary to their agreement in that behalf as aforesaid; whereupon the defendant caused and procured the wheat to be stopped, and then hindered and prevented the same from being delivered to the plaintiffs, as they lawfully might for the cause aforesaid. Verification.

The plaintiffs joined issue on the first and second pleas, and replied *de injuriâ* to the third.

At the trial of the cause before *Maule J.*, at the adjourned sittings in *London* after *Michaelmas* term, 1839, the plaintiffs' counsel opened the following as the facts of the case. The plaintiffs are corn merchants at *Cranbrook* in *Kent*, carrying on business under the firm of *John Wilmshurst and Son*; and are also partners in a banking house there under the firm of *Wilmshurst, Hague, and Co.* The defendants are corn merchants at *Lynn*, in the county of *Norfolk*. On the 25th of *October*, 1836, the defendants contracted to sell to the plaintiffs a quantity of wheat on the terms mentioned in the following sold note signed by the defendants. A corresponding bought note was, at the same time, signed by the plaintiffs.

“Sold, the 25th of *October*, 1836, to Messrs. *John Wilmshurst and Son*, about 300 quarters of wheat, as per sample, at 51s. per quarter on board. Payment by bankers' draft on *London* at two months' date, to be remitted on receipt of invoice and bill of lading.”

On the 27th of *October*, the wheat, which consisted of 310 quarters, was shipped on board of a vessel called

the *Ramsgate, W. Lightowler* master, for *Maidstone*, deliverable "unto order, or to assigns, he or they paying freight," &c. On the same day the defendants, in pursuance of an arrangement to that effect with the plaintiffs, whereby the defendants were to charge the plaintiffs with the premium in addition to the cost price of the wheat, gave orders to their agents in *London*, to effect an insurance on the wheat, and to hand the policy to the plaintiffs. The defendants forwarded to the plaintiffs the bill of lading, indorsed in blank, and an invoice of the wheat in a letter, wherein they requested the plaintiffs to remit to them the amount of the invoice, after having added to it the charges for insurance. The wheat was described in the invoice "as a cargo of wheat shipped on board the *Ramsgate, W. Lightowler* master, for *Maidstone*, by order, and for the account and risk, of Messrs. *John Wilmshurst* and Son." On the 29th, the plaintiffs received the policy of insurance on the wheat from the defendants' agents, with an account of the charges thereon, amounting to 5*l.* 12*s.* 1*d.* On the 30th, the plaintiffs transmitted to the defendants by post a bill for 796*l.* 2*s.* 1*d.* (being the invoice price of the wheat and the charges for insurance), in the following form :

<p>" £796 2<i>s.</i> 1<i>d.</i> s £</p> <p>" Two m hundred and penny, value</p> <p>" Messrs. Mercha</p>	<p><i>Lynn</i>, 27th October, 1836.</p> <p>ie pay to our order seven nds, two shillings, and one</p> <p>l Son, "</p>
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By return of post on the 1st of *November*, the defendants sent back this bill to the defendants, inclosed in the following letter : —

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“ Gentlemen, — We have your favour of the 30th ult., inclosing your acceptance, which being contrary to agreement, we return, and have arranged otherwise for the disposal of the cargo.”

On the 3d of *November*, *Wilmshurst*, the son, wrote the following reply : —

“ Gentlemen, — I was much surprised at the tenor of your letter this morning. It was altogether an error of my father's in sending a bill drawn on us as merchants. However, we now send you a bankers' acceptance, and trust you will see the wheat forwarded immediately.”

In this letter a bill was inclosed as follows : —

“ £796l. 2s. 1d. ³ *Lynn, 27th October, 1836.*

“ Two months after date pay to our order seven hundred and ninety-six pounds, two shillings, and one penny, value received.

“ Messrs. *Wilmshurst, Hague, and Co.,*
 Bankers, *Cranbrook.*”

By the same post, the younger *Wilmshurst* sent a second letter to the defendants offering, in case the defendants should not be “ agreeable ” to take the bill last sent, to pay cash for the wheat, less the discount. The defendants, considering the second draft not to be a compliance with the terms of the contract, returned it also in a letter, repeating that the cargo was otherwise disposed of.

Immediately after they returned the first draft, the defendants got the wheat back from Captain *Lightowler*. They subsequently sold it at 56s. a quarter.

Upon this statement of facts the learned Judge observed that the third plea must be taken as proved, and that the only question was, whether such plea would be

an answer to the action after verdict. It was thereupon agreed that a verdict should be entered for the plaintiffs on the first and second issues, and for the defendants on the third, with liberty to the defendants, in the event of the plaintiffs obtaining a rule for judgment *non obstante veredicto* on the third plea, to move that the verdict might be entered for them upon the second issue, on the ground of the mis-statement of the contract in the declaration (the omission of the stipulation as to the terms of payment); the court to have the same power of amendment as the judge at nisi prius.

The damages were assessed contingently at 77*l*.

Butt having obtained in *Hilary* term, 1840, a rule nisi for judgment *non obstante veredicto*, on the third plea,

Greenwood now shewed cause. The question is, whether the vendors were bound to perform their part of the contract, although the vendees had failed to fulfil theirs. It is clear that the latter had no right to retain the invoice and the bill of lading, without remitting to the former a bankers' draft on *London*; for the sale of the wheat, and the sending of the draft, were not collateral, but were to be contemporaneous acts. *Brandt v. Bowlby* (a) is very similar to the present case, and is a decisive authority for the defendants. There, the court held that the wheat did not vest absolutely in the vendee upon its shipment, but only subject to a condition that the bills of exchange, drawn for the price, were accepted, and that such bills having been dishonoured, the property in the wheat never did vest in the vendee. *Parke J.* there says, "I agree to the law laid down in argument that a contract cannot be rescinded by one only of two

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(a) 2 B. & Ad. 932.

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contracting parties; but the question in this case is, whether the property in the goods shipped ever vested in *Berkeley* at all. That depends entirely on the intention of the consignors. It is said that the plaintiff, by the very act of shipping the wheat in pursuance of *Berkeley's* order, irrevocably appropriated the property in it to him. I think that is not the effect of their conduct; for, looking to the letter of the 26th of *August*, it manifestly appears that they intended that the property should not vest in *Berkeley* unless the bills were accepted." That case is even stronger than this; there the wheat was shipped in a vessel chartered by the vendee; but here, the wheat was purchased in bulk, and was put on board of a general ship. The principle laid down in *Brandt v. Bowlby* is not opposed to *Walley v. Montgomery* (a); for there the consignee was ready and offered to perform his part of the contract. Here, the right of possession would not vest in the vendees until they sent the bankers' draft, and on their failure to do so, the vendors had, according to the authority of *Langfort v. Administratrix of Tiler* (b), a right to rescind the contract. It will be contended on the other side, that the delivery of the wheat to the carrier was a delivery to the consignees, and that the contract could not afterwards be rescinded. *Brandt v. Bowlby*, however, is a direct authority against that proposition. And *Barber v. Taylor* (c) shews that the contract was still *in fieri*, although the goods were on ship board; and that, on the failure of either party to perform his part of the contract, it might be determined. According to *Bishop v. Shillito* (d), even if the wheat had been actually delivered to the plaintiffs, the defendants, on the non-performance by the former of the stipulations of the sale, might have maintained trover for it. The

(a) 3 *East*, 585.

(b) 1 *Salk.* 113.

(c) 5 *M. & W.* 527.

(d) 2 *B. & Ald.* 329. n.

facts set out in the pleas to the count in trover, when this case was before the court on a former occasion (a), were nearly the same as those now disclosed; and *Tindal* C. J., in delivering the judgment, said, "In order to maintain trover the plaintiffs must not only have the right of property in the goods for which the action is brought, but the right to the possession also. And in this case, admitting that the contract of sale vested the property of the wheat in the plaintiffs, yet, before they acquired the right to the possession of the wheat, the plaintiffs were bound, by the terms and conditions of the contract, upon the receipt of the invoice and bill of lading of the wheat, to remit to the defendants a bankers' draft on *London* at two months' date, which they altogether failed to do. It was a condition, obviously introduced for the security of the defendants, that they should not part with the possession of the wheat until the bankers' draft was remitted; and, for this purpose, the receipt of the invoice and bill of lading by the plaintiffs are made, by the terms of the contract, concurrent acts, and consequently the entire failure in the performance of the latter act on the part of the plaintiffs, prevented the right of possession of the wheat from vesting in them." There are many authorities to shew that the mere signing of the bill of lading does not vest the goods absolutely in the vendee. In *Mitchel v. Ede* (b) Lord *Denman*, speaking of the nature and operation of the bill of lading, says, "As between the owner and shipper of the goods and the captain, it fixes and determines the duty of the latter as to the person to whom it is (*at the time*) the pleasure of the former that the goods should be delivered. But there is nothing final or irrevocable in its nature. The owner of the goods may change his purpose at any rate before

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(a) 5 *New Cases*, 541., (b) 11 *A. & E.* 888., 3 *P.*
7 *Scott*, 561. & *D.* 518.

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the delivery of the goods themselves, or of the bill of lading to the party named in it, and may order the delivery to be to some other person to *B.* instead of to *A.*" Here, according to the terms of the contract, it was necessary for the goods to be shipped before the bill of lading could be obtained. Reliance will be placed on an insurance having been effected upon the goods on account of the vendees; but the effect of that was to vest the goods in them, not absolutely, but only subject to the terms indorsed on the bill of lading. It was held in *Bloxam v. Sanders* (a), that although a vendee of goods acquires a right of *property* by the contract of sale, yet he does not acquire a right of *possession* to the goods until he pays or tenders the price. It will be said that the liability to the loss in case of the destruction of the goods, is the true criterion; but such liability, and the right of possession and of property, are not convertible terms. In *Simmons v. Swift* (b) *Bayley J.* says, "Generally speaking, where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, the property passes immediately, so as to cast upon the purchaser all future risk, if nothing further remains to be done to the goods, although he cannot take them away without paying the price. If any thing remains to be done on the part of the seller, until that is done the property is not changed."

There is a recognised distinction between a contract for the sale of a specific chattel, and for the delivery of a quantity from the bulk. In the former case the property passes; in the latter, even after there has been an appropriation of the goods by the vendors, a distinct assent on the part of the vendees is necessary to vest the goods in them; *Rohde v. Thwaites* (c), *Atkinson v.*

(a) 4 B. & C. 941., 7 D.
 & R. 396.

(b) 5 B. & C. 857., 8 D.
 & R. 898.

(c) 6 B. & C. 388., 9 D.
 & R. 293.

Bell (a). That a delivery to a general ship is not equivalent to a delivery to the vendee, is clear on three grounds; in the former case, there is, — first, the right to stop *in transitu*; secondly, the right of the vendor to insist on the vendee's compliance with the terms of the contract; and, thirdly, the right of the vendee to refuse the goods, as not being according to the contract. The effect of the shipment of the goods is, to appropriate the goods to the vendee if he assents to take them; and the goods are at his risk, not because the property in them is vested in him, but because he is bound to accept them if they answer the contract. In *Mason v. Lickbarrow (b)* Lord *Loughborough* says, "I state it to be a clear proposition, that the vendor of goods not paid for, may retain the possession against the vendee, not by aid of any equity, but on grounds of law. * * * A destination of the goods by the vendor to the use of the vendee; the marking them, or making them up to be delivered; the removing them for the purpose of being delivered, may all entitle the vendee to act as owner, to assign, and to maintain an action against a third person into whose hands they have come. But the title of the vendor is never entirely divested till the goods have come into the possession of the vendee. He has, therefore, a complete right, for just cause, to retract the intended delivery, and to stop the goods *in transitu*." *Fearon v. Bowers (c)* shews that what took place here did not amount to an absolute delivery of the wheat to the plaintiffs. In *Dixon v. Yates (d)* *Littledale J.* lays it down, that "so long as goods sold and unpaid for remain in the immediate possession of the vendor, he may refuse to deliver them; and if they remain in the possession of his agent, *i. e.* a warehouseman or carrier, he may stop them."

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(a) 8 B. & C. 277., 2 M. & R. 292.

(b) 1 H. Bl. 363.

(c) 1 H. Bl. 364. n.

(d) 5 B. & Ad. 313., 2 N. & M. 177.

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In *Feise v. Wray* (a) Grose J. says, "This is a common case of consignor and consignee, where the former has not been paid for his goods, and he gets the bill of lading honestly into his possession, and stops the goods while they are *in transitu*. How then can we say that he is a tort-feasor, and guilty of a conversion? In *Stokes v. La Riviere*, cited in *Bohtlingk v. Inglis* (b), it was said by Lord Mansfield, "No point is more clear than that if goods are sold, and the price not paid, the seller may stop them *in transitu*. I mean in every sort of passage to the hands of the buyers. There have been a hundred cases of this sort. Ships in harbour, carriers, bills have been stopped. In short, where the goods are *in transitu*, the seller has that proprietary lien. The goods are in the hands of the defendants to be conveyed: the owner may get them back again." In *Barrow v. Coles* (c), which turned on the effect of the bill of lading, the facts were these: By a bill of lading goods were made deliverable to J. S., if he should accept and pay a bill of exchange, if not, to the holder of the said bill of exchange. J. S. accepted the bill of exchange, and indorsed the bill of lading for a valuable consideration, but failed to pay the bill of exchange when due. It was held that, on the dishonour of the bill of exchange, the property of the goods vested in the holder of it, and that he might maintain trover for the goods against the indorsee of the bill of lading.

It is clear, upon the authorities, that if there is stipulation in the contract that the goods are to be paid for in a particular way, which stipulation is not fulfilled by the vendee, the vendor may rescind the contract. Here, the invoice and the bill of lading were only delivered to the vendees conditionally on their sending the vendors a bankers' draft on *London*, and upon their

(a) 3 East, 93, 101.
 (b) 3 East, 381.

(c) 3 Campb. 92.

failing to do so, the property, or at all events the right of possession to the goods, never vested in them.

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Butt, in support of the rule. This case rests on clear principles of law. It is not a case of a qualified, but of an absolute bill of lading, which was delivered to the vendees. The authorities, therefore, in which the bills of lading were qualified, or where they never came to the hands of the vendee, are inapplicable. Neither is *Brandt v. Bowlby* in point; for there the vendee had at first refused to accept the goods. The cases cited to shew that an unpaid vendor may stop goods *in transitu*, although the property in the goods has vested in the vendee, will not be disputed. Here, the goods were delivered to the captain of the vessel, who received them at the risk of the vendees. *Walley v. Montgomery* is a direct authority for the plaintiffs. There, the consignor of goods abroad advised the consignee, by letter, that he had chartered a ship on his account, and inclosed him an *invoice* of the goods laden on board, which were therein expressed to be *for account and risk of the consignee*, and also a bill of lading in the usual form, requiring the delivery to be made to order, &c. he paying freight for the said goods according to charter-party. The letter of advice also informed the consignee that the consignor had drawn bills on him at three months for the value of the cargo. It was held that the invoice and bill of lading sent to the consignee, and the delivery of the goods to the captain, vested the property in the consignee, subject only to be divested by the consignor's right to stop the goods *in transitu*, in case of the insolvency of the other. *Grose J.* there says, "By the bill of lading and invoice sent to the plaintiff, and the delivery to the captain, the property passed from them to the plaintiff to every purpose except as to the right of stopping the goods *in transitu* to

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the vendee.” [Maule J. Here, if the vendors had sent the bill of lading by a clerk, would he have been bound to deliver it to the vendees without receiving a bankers’ draft? Do you say that the vendees had a right to retain the bill of lading without sending such draft?] There is a clear distinction between the case of an unpaid vendor still retaining the goods, and one where, as here, the vendors have parted with the possession. The authorities which have been cited to shew that the right of property and possession of the goods did not vest in the vendee until payment of the price, were all cases where the vendors still retained the possession of the goods. In *Rohde v. Thwaites* and *Atkinson v. Bell*, the question was, whether there had been an appropriation or acceptance of the goods, so as to satisfy the statute of frauds. It is said that this was not a sale of any specific wheat; but it is submitted that it was. [Maule J. Suppose the defendants, after the contract, had bought 300 quarters of wheat, and had sent it to the plaintiffs, could they have refused to take them? This is a general contract, and comprehends therefore *any* 300 quarters of wheat.] If any thing turns on this point, there is nothing in the case to shew that this wheat was part of a larger quantity in bulk. [Tindal C. J. It has a little bearing, though not much, on the question, whether the property in the goods passed to the vendees.] *Simmonds v. Swift* was cited to shew that the liability to bear the loss of goods is not the true criterion to prove whether the property has vested in the vendee; but, although not conclusive, it is always put as a strong test. The former decision in this case is no authority against the plaintiffs; for the Lord Chief Justice in delivering the judgment of the court abstained from deciding the present question; observing that upon the then state of the record, it was unnecessary to determine “whether the defendants upon the request of the plaintiffs to remit the draft

upon the *London* bankers, had the right *forthwith* to rescind the sale." *Mitchel v. Ede* was a very different case from the present. In *Dutton v. Solomonson* (a), it was held that the delivery of goods by the vendor, on behalf of the vendee, to a carrier not named by the vendee, is a delivery to the vendee. Lord *Alvanley* there said, "When this point was first mentioned I was surprised; for it appeared to me to be a proposition as well settled as any in the law, that if a tradesman order goods to be sent by a carrier, though he does not name any particular carrier, the moment the goods are delivered to the carrier it operates as a delivery to the purchaser; the whole property immediately vests in him; he alone can bring any action for any injury done to the goods; and if any accident happen to the goods it is at his risk. The only exception to the purchaser's right over the goods is, that the vendor, in case of the former becoming insolvent, may stop them *in transitu*." *Fragano v. Long* (b), *Alexander v. Gardner* (c), and *Tansley v. Turner* (d), all shew clearly that the property in the wheat passed to the plaintiffs. The distinction between a delivery to an agent and to the vendee, is only material where the vendor has a right to stop *in transitu*, and it becomes important to know whether the goods have arrived at their ultimate destination. No authority has been cited in which it has been held that a vendor may stop *in transitu*, except in the case of the vendee's insolvency or bankruptcy. Here, it is expressly stated in the declaration, that the defendants had parted with the possession of the wheat. [*Erskine* J. You must incorporate the plea with the declaration.] The plea merely alleges that there was a

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(a) 3 B. & P. 582. (c) 1 New Cases, 671.,
(b) 4 B & C. 219., 6 D. & 1 Scott, 630.
R. 283. (d) 2 New Cases, 151.,
2 Scott, 238.

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condition in the contract; it does not say that the draft was to be sent before the delivery of the goods, but only on the receipt of the invoice and the bill of lading. It is consistent with the contract that the bill of lading was to be transmitted after the goods had been dispatched. The plea does not even aver that a reasonable time had elapsed for sending the draft; neither does it state when the goods were stopped. It is submitted that there was here a perfect delivery in law of the goods. It is admitted that the plaintiffs would have been liable, in case of loss, and there is nothing in the contract to shew that the plaintiffs were not to have possession of the goods previously to sending the bankers' draft; for the meaning of the contract appears to be, that it should be sent *after* the receipt of the bill of lading. The contract was substantially for the purchase of goods at two months' credit. No right of the vendors to stop the goods is shewn on the record. Their only remedy against the plaintiffs for not sending the draft was, by bringing an action upon the contract.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court. This action comes for a second time before us on a question now raised upon the third plea to the first count of the declaration, the plaintiffs contending that notwithstanding the verdict which has been found for the defendants on the issue raised upon that plea, they are entitled to demand the judgment of the court in their favour upon such first count. That count states, in substance, that the defendants sold to the plaintiffs a certain quantity of wheat at a certain price; that the defendants, by order of the plaintiffs, shipped the same on board a certain vessel, to be carried to *Maidstone* for the account and on the risk of the plaintiffs, there to be delivered to the plaintiffs; that the defendants

parted with the possession of the wheat, and delivered the same out of their possession to the master of the vessel, who received the same, and had the possession thereof, for the purposes last aforesaid; that the master signed a bill of lading to deliver the said wheat to the order of the defendants; and that the defendants indorsed such bill of lading to the plaintiffs, and signed an invoice of the wheat, and sent the invoice and bill of lading, so indorsed, to the plaintiffs in a letter, requiring them to remit the amount of the invoice and the charges of insurance in course; which letter, with the invoice and bill of lading so indorsed, were received by the plaintiffs; and the declaration then assigns, as a breach of the contract, that the said plaintiffs being the holders of the said bill of lading and not being bankrupts or insolvents, but being lawfully entitled to have the wheat delivered to them, the defendants, without the licence and against the will of the plaintiffs, *revoked and rescinded the sale, and caused the wheat to be stopped in its passage to the plaintiffs*, and forthwith upon such stoppage, and without giving notice of their intention, hindered the wheat from being delivered to them, *per quod*, they sustained the special damage set out in the first count of the declaration.

The third plea to this count alleges, in substance, that the plaintiffs bought, and the defendants sold, the wheat in the first count mentioned, at the price therein mentioned, upon the terms and conditions for the payment thereof as follows: namely, "that the payment thereof shall be made by bankers' draft on *London* at two months' date, to be remitted by the plaintiffs to the defendants upon receipt by the plaintiffs of the invoice and bill of lading;" that the plaintiffs received the invoice and bill of lading, but did not, on such receipt thereof, remit, or offer to remit, to the defendants any bankers' draft on *London* for payment of the price, but

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failed and neglected so to do, contrary to their said agreement, whereupon the defendants caused the wheat to be stopped, and prevented the same from being delivered to the plaintiffs, as they lawfully might.

The question therefore is, whether after the sale of the wheat to the plaintiffs, and such constructive delivery thereof to them as is stated in the declaration, the defendants were justified in stopping the wheat *in transitu*, upon the ground set forth in the plea.

That the defendants cannot justify the stoppage of this wheat *in transitu*, upon the ordinary ground on which such right is exercised, may be readily admitted. The ordinary right of countermanding the actual delivery of goods shipped to a consignee, is limited to the cases in which the bankruptcy or insolvency of the consignee has taken place. The law as to this point is very clearly laid down by Lord *Stowell*, in the case of *The Constantia* (a), and in many cases in the common law reports (b): and as, in the present case, the first count directly alleges that the plaintiffs were neither bankrupt nor insolvent at the time when the stoppage took place, and as no traverse is taken upon this allegation, it must be taken that the common ground of stopping *in transitu* is wanting in the present case. But the question in this case is, whether, under the particular terms of this contract, the consignors have not reserved to themselves the power of withholding the actual delivery of the wheat, until the consignees should comply with the mode of payment stipulated by the contract. There is no doubt that the *property* in the wheat passed to the plaintiffs under the contract, upon which point much of the argument before us has turned; but the question is, as to the intention of the parties, as evidenced by the contract, with reference to the *delivery of possession*.

(a) 3 Rob. Adm. Rep. 321.

(b) Vide 2 N. & M. 644.

And we are of opinion, that the intention of the parties, under this contract, was, that the consignors should retain the power of withholding the actual delivery of the wheat, in case the consignees failed in remitting the bankers' draft, not upon the delivery of the wheat, but on the receipt of the bill of lading; which, in the ordinary course of business, would precede the arrival or delivery of the wheat. And we think the object of making the receiving of the invoice and bill of lading and the remitting of the bankers' draft to be simultaneous or concurrent acts, could have been no other than to afford security to the consignors, so that in case the consignees failed in the performance of the latter stipulation, the consignors might withhold the actual delivery of the cargo. When goods are sold, and nothing is said about the time of delivery or the time of payment, the seller is bound to deliver them whenever they are demanded *on payment of the price*; "but the buyer," as is observed by Mr. Justice Bayley in *Bloxam v. Sanders* (a), "has no right to have the possession of the goods until he pays the price." In the present case, it is part of the stipulation that something shall be done by the buyer before the time when, in the usual course of business, the goods can be actually delivered; namely, upon the handing over of the bill of lading to the buyers, which ordinarily precedes the arrival of the ship; so that the right to the possession of the goods could not vest until the buyers either remitted, or tendered or offered to remit, the bankers' draft in payment. And we think this view of the case not inconsistent with the judgment of the court in *Walley v. Montgomery* (b); in which, although it was held that the consignors had no right to stop *in transitu*, it is to be observed, that the consignees had never refused to accept the bills which had

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(a) 4 B. & C. 948, 7 D. & R. 405.

(b) 3 East, 585.

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been drawn on them for the price of the timber, but, on the contrary, were ready and offered so to do; nor, indeed, does it appear in that case to have been a condition that the bills should be accepted at any certain time before the actual delivery. In the present case, we hold, that upon the proper construction of the plea, the contract of sale, entered into between the parties, was conditional as to the right of possession of the cargo; and that the condition not having been performed on the part of the plaintiffs, the consignees, the defendants, the consignors were justified in preventing the wheat from being delivered.

Rule discharged. (a)

(a) And see *Westsynthius*, in re, 2 Nev. & Mann. 644, 645., 5 B. & Ad. 817.; *Allan Stewart & Co. v. Creditors of*

Stein, & *Bell's Commentaries on the Law of Scotland*, 3d ed. 96 n. 2., 2 Nev. & M. 651 n.

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ASSUMPSIT, for 200*l.*, for work and labour done by the plaintiffs as attorneys for the defendants, and on their retainer, in and about the prosecuting of divers proceedings in bankruptcy, and for fees due, &c., and for work and labour in drawing, copying, and ingrossing, divers petitions, bonds, &c.; with counts, for money paid, and on an account stated.

Pleas: by the defendant, *Williams*, first, non assumpsit; secondly, as to the first and second counts, that the plaintiffs were attorneys of the court of Queen's Bench, and that the money claimed by them in their first count, was money claimed to be due to them, as attorneys, for work and labour, in and about certain proceedings at law and in equity, to wit, in the court of Bankruptcy, prosecuted and conducted by the plaintiffs, as such attorneys, and for fees and charges due and payable to them in respect thereof; and that the money claimed by the plaintiffs in their second count, was a sum claimed to be due to them for disbursements made by them in the course of such proceedings at law and in equity; and that no bill of the fees, charges, and disbursements of the plaintiffs, so being fees, charges, and disbursements at law and in equity, for or in respect of the said work and labour, &c., was delivered to the defendants, — they the defendants being the persons to be charged therewith (*a*), — or left for them at their last respective places of abode (*b*), — one month before the

Proceedings under a fiat in bankruptcy before country commissioners, appointed under 1 & 2 *W. 4. c. 56.*, are not proceedings at law or in equity, requiring the delivery of a signed bill of costs, under 2 *G. 2. c. 23. s. 23.*

(*a*) This allegation, though unnecessary with respect to the first count, appears to be material with reference to the second.

(*b*) *Quære*, whether the plea sufficiently negatives a compliance with this part of the 2 *Geo. 2. c. 23. s. 23.* A delivery of the bill to the de-

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commencement of this suit, according to the form of the statute in such case made and provided. Verification.(a)

Replication: to the first plea, similiter; to the second plea, that the money claimed by the plaintiffs in respect of the said work and labour, &c., in the first count, was not claimed by them, and was not due for the work and labour, &c., in or about any proceedings at law or in

fendants appears to be sufficiently negatived, because a delivery to one would be a delivery to both; but a statement that no bill was left for them at their last *respective places* of abode, does not negative a leaving at the place of abode of one of them; yet in the case of a joint retainer, a delivery to, or a leaving for, one of the clients has been held to be a sufficient compliance with the statute; *Crowder v. Shee*, 1 *Campb.* 437.; *Finchett v. How and Jarratt*, 2 *Campb.* 275.; *Owenham v. Lemon*, 2 *Dowl. & R.* 461. If, therefore, in the principal case, the court had been of opinion that the evidence supported the allegations of the second plea, and had directed a verdict to be entered for the defendant on the second issue, the plaintiffs might have moved for judgment *non obstante veredicto*; and if they had been too late to move for judgment *non obstante veredicto*, or if a rule for such judgment had been refused or discharged, a writ of error would have still been open to them. But if the court had directed a *nonsuit* to be entered, the plaintiffs would have been without remedy in this action. If they had refused at the trial to assent to leave being given to move

to enter a nonsuit, a verdict would have been directed to be entered for the defendant *Williams*. In ordinary cases a verdict for the defendant is more disadvantageous to the plaintiff than a nonsuit; but a judgment upon a verdict for a defendant on an issue which admitted that a signed bill had not been delivered, would appear to be no bar to an action brought after delivery.

(a) Since the rules of *H. 4 W. 4.*, this defence must be pleaded specially: see *Beck v. Mordant*, 2 *New Ca.* 140., 4 *Dowl. P. C.* 112.; *Lane v. Glenny*, 2 *N. & P.* 258., 7 *A. & E.* 83.; *Robinson v. Rowland*, 4 *Dowl. P. C.* 271.; *Moore v. Dent*, *Moo. & Rob.* 462.; *Holmes v. Grant*, *Gale*, 59. But although the new rules have restored the antient practice of pleading this defence specially, and if pleaded specially, the conclusion must be, either expressly or impliedly to the court, and not to the country, it is not (*Bodenham v. Hill*, 7 *M. & W.* 274., 8 *Dowl. P. C.* 862.), and never was (*Co. Litt.* 303.; *Millner, an Attorney, v. Crowdale*, 1 *Show.* 388.; *Fanshaw v. Morrison*, 2 *Salk.* 520., 2 *Ld. Raymond*, 1138. 1140.) necessary to conclude such plea with a *verification*.

equity; with a similar traverse in respect of the allegations relating to the second count. Similiter.

The other defendant suffered judgment by default.

At the trial before *Bosanquet J.*, at the sittings at *Westminster* in last *Trinity* term, the plaintiffs sought to recover the amount of a bill for business done by them, acting before commissioners of bankruptcy, under a country fiat, as solicitors for the defendants, who had been previously appointed assignees. The bill had been taxed and allowed by the commissioners, but no signed bill had been delivered to the defendants. The proceedings under the fiat, which, subsequently to the commencement of the action, had been entered of record pursuant to the 2 & 3 *W. 4. c. 114. s. 8.*, were produced.

For the defendant *Williams* it was submitted, that a nonsuit should be entered, or a verdict for the defendant on the second issue, as well as on so much of the first issue as applied to the account stated; and, if not, that the verdict should be reduced by a sum of 13*l.* 0*s.* 6*d.*, being a sum charged for expenses incurred in effecting a sale of an equitable mortgage belonging to the bankrupt, which sum, it was contended, ought to have been deducted by the plaintiffs out of the proceeds of the sale. The sale had taken place with the assent of the assignees, but without the sanction of the court of Review. A verdict was found for the plaintiffs, with leave to the defendant *Williams* to move to enter a nonsuit, or to reduce the damages by striking out the 13*l.* 0*s.* 6*d.*

A rule having been obtained, in *Michaelmas* term, by *Bompas Serjt.* to that effect,

Talfourd Serjt. (with whom was *Whateley*) now shewed cause. The first branch of this rule raises a question of very general importance, namely, whether a bill for working a country fiat is within the 2 *G. 2. c. 23. s. 23.*, and ought to be delivered a month before action brought;

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and consequently whether such a bill is liable to taxation, the two propositions being coextensive. Independently of any authority, it is clear that, before the statute of 1 & 2 W. 4. c. 56., such a bill was not taxable; That it was not so, is fully established by *Crowder v. Davies* (a), and by *Hamilton v. Pitt* (b), in which the former case is recognised. This point was indeed conceded when the present rule was obtained. On referring to the language of the two statutes, it will be seen that no alteration has been made by the latter act, and that these proceedings are still without the character of—business transacted in a court of law or equity. [*Erskine J.* The plaintiffs were not the attorneys who took out the fiat.] The bill is against the assignees, and for proceedings subsequent to the fiat. [*Erskine J.* The ordinary course is, that the attorney presents his bill, and it is paid out of the first proceeds which come to the hands of the assignees. Here, if the charge had been for taking out the fiat, no question would have been made as to the taxability of the bill.]

By the first section of 1 & 2 W. 4. c. 56., His Majesty was authorised to create a court of Bankruptcy with four judges and six commissioners, who were to constitute the court of Bankruptcy; and that court was to be a court of law and equity. The second section provides for the establishment of a court of Review, as a court of appeal, with “superintendence and control in all matters of bankruptcy,” and power, jurisdiction, and authority to hear and determine, order and allow, all such matters in bankruptcy as now usually are, or lawfully may be, brought, by petition or otherwise, before the Lord Chancellor. The fifth section enacts, that all costs of *suit* between *party and party*, in the said court

(a) 3 Y. & J. 433.

(b) 7 Bingh. 230. 232. S.C.

1 Dowl. P. C. 209. *Hamilton v. Pitt*, 4 M. & P. 868.

of Review shall be in the discretion of the court, and shall be taxed by one of the masters in the court of Chancery. This is the only provision in the statute relating to the taxation of costs; and it is expressly limited to costs *between party and party*. The 3 & 4 W. 4. c. 47. s. 8. substitutes the registrars and deputy registrars of the court of Bankruptcy as taxing officers; but it makes no other alteration in the practice.

The commissioners were authorised, by the 6 G. 4. c. 16. s. 14., to settle all bills of fees, or disbursements, of any attorney or solicitor employed under any commission, *for business done after the choice of assignees*, except that so much of such bills as contained any charge respecting any action at law or suit in equity, was to be settled by the proper officer of the court in which such business had been transacted. The plaintiffs' bill has been settled by the commissioners. The 1 & 2 W. 4. c. 56. s. 12. empowers the Chancellor to issue his fiat, in lieu of the commission of bankrupt under the great seal, thereby authorising the creditor to prosecute his complaint in the court of Bankruptcy, or to prosecute the same *elsewhere*, before such discreet and proper persons, as the Lord Chancellor may think fit to nominate and appoint; that is, before country commissioners. The next section directs that every such fiat, prosecuted *in the said court of Bankruptcy*, shall be filed and entered of record in the said court; not mentioning those prosecuted elsewhere. By the fourteenth section the judges are to return names of the barristers, &c., and all fiats, not directed to the court of Bankruptcy, are to be directed to one or more of the persons appointed to act as commissioners in the country. Country fiats are therefore described, as fiats prosecuted *elsewhere* than in the court of Bankruptcy. A distinction is clearly drawn between the two classes of fiats in the 2 & 3 W. 4. c. 114. s. 5., by which it is enacted, that all fiats

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issued in lieu of commissions of bankrupt, *to be prosecuted elsewhere than in the said court of Bankruptcy*, and adjudications by country commissioners, may and shall be entered of record in the said court of Bankruptcy, upon the application of any person interested therein, on payment of certain fees. [*Tindal* C. J. Were the proceedings inrolled in this case?] They were. They could not have been received in evidence at the trial of this cause, if that statutory requirement had not been complied with. [*Erskine* J. The inrolment would be part of the proceedings under the fiat.] The inrolment formed no part of the matters sued for, having been made after action brought, and after plea pleaded, for the purpose of enabling the plaintiffs to bring forward these proceedings as evidence at the trial. An attorney who brings an action for his bill necessarily causes the proceedings to be inrolled at some time before the trial. But the inrolment cannot have a retrospective effect, and make the bill taxable, as relating to proceedings at law or in equity, where, at the time of bringing the action, and when the defendant *Williams* pleaded, the proceedings had not been inrolled. There is, of course, no charge in the bill, which forms the subject of this action, in respect of any inrolment. [*Erskine* J. The question might arise under the general authority given by the second section of 1 & 2 W. 4. c. 56.] The Chancellor is in the habit of ordering bills of costs in bankruptcy to be taxed, though they have been allowed by the commissioners. [*Erskine* J. The Chancellor has not repudiated his authority, as the courts of common law have done (a); and he possesses such authority by the 6 G. 4. c. 16. s. 14.] According to the doctrine contended for on the other side, bills of

(a) *Vide* *Dagley v. Kentish*, 2 B. & Ad. 411.; *King, ex parte*, 3 N. & M. 437.

costs in bankruptcy must be taxed twice. [Erskine J., 1841.
The registrar does not tax without a special order.]
That certainly is an answer to the objection. But HARPER
why should a bill be delivered a month before the v.
commencement of an action, if it is not to be taxed? WILLIAMS.
[Erskine J. It is the commissioner in effect who taxes
— through his registrar.] If there is no machinery by
which a bill can be taxed without a special application,
the case comes within the decision in *Becke v. Wells (a)*,
where it was held, that for business done by the plaintiff
as an attorney, in the *Middlesex* court of Requests, no
bill need be delivered, because that court has no taxing
officer. Bayley B. says, “There is no case of referring
a bill for taxation for business done in a court where
there is no taxing officer. The provision is — ‘to be
taxed and settled by the proper officer of such court.’
There must, therefore, be a proper taxing officer.”

As to the second branch of the rule, the damages ought
not to be reduced by disallowing the costs attending
the sale of the bankrupt's equitable mortgage, that sale
having been necessary. [Erskine J. An order might
have been obtained from the court of Review, direct-
ing a sale of the property under the equitable mort-
gage. The words of the order are clear. I do not
see how the plaintiffs can charge the assignees per-
sonally for the expenses of the sale. It is a sale by a
mortgagee, in which the assignees concur. Where the
deposit of the deeds is accompanied by a memorandum
in writing, the expenses are paid out of the produce of
the sale; where there is no written memorandum, they
are borne by the equitable mortgagee.]

Bompas Serjt. (with whom was *Tomlinson*) in support
of the rule. If the verdict can be supported at all, it is

(a) 3 *Tyrolh.* 198., 1 *C. & M.* 75.

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clear that it must be reduced by the 13*l.* 0*s.* 6*l.* But proceedings in courts of bankruptcy are proceedings at law and in equity, within the 2 G. 2. c. 23. s. 23.; and it is for the benefit of all parties that they should be so considered. In the case of country assignees, though there may be no proper taxing officer, no reason has been alleged why a bill of costs should not be delivered. Bills of costs for proceedings in the insolvent debtors' court have been held to be proceedings at law and in equity; *Smith v. Wattleworth* (a); where the business for which the action was brought was the obtaining of the discharge of a person arrested by process out of a court of law. There is no material difference between country fiats and those worked before a commissioner in town. [*Erskine J.* The court of Bankruptcy is declared to be a court of law and equity, and the *London* commissioners sit in the court of Bankruptcy. The country commissioners are sitting *elsewhere*.] The statute directs that the country commissioners shall have the same powers, jurisdiction, and mode of proceeding as the *London* commissioners, and the court of Review has the same power over country fiats as over fiats worked before *London* commissioners. [*Erskine J.* The court of Review takes notice of nothing without a petition or a motion.] The first step would be taken in the court of Bankruptcy. [*Erskine J.* The whole foundation of the proceeding must be an act of bankruptcy, a matter arising out of court.] The only mode in which a person can become bankrupt is by the adjudication,—an act in the court of Bankruptcy. [*Coltman J.* This case is not a case of charges for making the party a bankrupt.] The bill certainly contains no such charges; but the case was put as analogous. [*Tindal C. J.* Looking at the twelfth and thirteenth sections,

(a) 4 B. & C. 364., 6 D. & R. 510.]

the distinction is clear between fiats prosecuted in the court of Bankruptcy, and those prosecuted before country commissioners; the statute makes one, a proceeding in a court of law and equity, but not the other. You rely upon the doubtful words of a former section. *Erskine J.* Proceedings before commissioners in the country, are not proceedings in the court of Bankruptcy.] The object of the 1 & 2 *W. 4. c. 56.* was, to make the proceedings *under that statute* proceedings at law or in equity. Proceedings, therefore, before a commissioner, whether in town or country, are proceedings at law or in equity. [*Coltman J.* Proceedings in the court of Bankruptcy are only substituted for proceedings before the Chancellor.] They are expressly made proceedings at law and in equity, not having been so before. [*Coltman J.* In *Collins v. Nicholson* (a) it was held, that the obtaining of a certificate was not a thing done in a court of equity (b)]. The argument would have been the same before with respect to the court of Chancery. All the proceedings before commissioners are to be filed of record. [*Tindal C. J.* That need not be done unless they are wanted to be given in evidence. The fiat may be worked without the proceedings being filed of record.] The object of the statute, in directing that the proceedings shall not be given in evidence unless they are filed of record, is, to compel such filing in all cases, even though the proceedings may not be required for the purpose of being given in evidence. (c) The public is interested in the proceedings being so filed. [*Bosanquet J.* It is to be done upon application.] But it is to be done upon the application of *any* person interested who may choose to require it. By the 5 & 6 *W. 4. c. 29.* dividends are to be paid into the bank, to the credit of

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(a) 2 *Taunt.* 321.; 1 *Ross*,
119. (from 2 *Taunt.* 321.)

(b) *Vide post*, 828. n.
(c) See Stamp Act.

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the accountant-general in bankruptcy, as well from country commissioners as from *London*. Here, there is such an officer. Though the course of proceeding in the court of Review is by petition, the proceeding is of the same nature as an application by motion in the courts of common law. The clerk of the peace is not in the habit of taxing except between party and party; nor is the officer of the insolvent debtors' court. Here, the objection, that there is no officer to whom the bills can be referred for taxation does not arise. [*Tindal* C. J. The present case is clear of that difficulty. If there is a taxing officer between party and party, he is a taxing officer generally.] Proceedings which are proceedings at law and in equity when in the court of Bankruptcy, are not less so when they are not carried on in that court. The circumstance that the proceedings are required to be registered in a court which is declared to be a court, of law and equity, shews that they are to be considered as proceedings at law or in equity. It could not be contended, that if the proceedings were actually filed, they would not be proceedings at law or in equity.

TINDAL C. J. The question for our consideration is, whether the charges which form the subject-matter of this bill are charges for proceedings at law or in equity, within the 2 G. 2. c. 23. s. 23. Unless they are within the necessary meaning of the statute, or the words of the statute, or within adjudged cases, the bill is not taxable, and therefore need not be delivered. It is admitted that charges for proceedings in bankruptcy were not subject to taxation before the 1 & 2 W. 4. c. 56. A bill of costs relating to proceedings in bankruptcy was not subject to taxation unless it contained some charge for an act done in the court of Chancery. It will be unnecessary to refer to cases upon this point. The question, therefore, is, whether, under the 1 &

2 W. 4. c. 56., a proceeding under a country fiat is a proceeding at law or in equity.

The distinction taken in the twelfth and thirteenth sections of the act, between proceedings before country commissioners, and those before *London* commissioners, is so pointed, that we cannot look upon the former as intended to be made proceedings in a court of law or equity. The twelfth section enacts, "that in every case wherein the Lord Chancellor, by virtue of any former act, hath power to issue a commission of bankrupt under the great seal, it shall and may be lawful for him, and also for the master of the Rolls, &c., on petition made to the Lord Chancellor, against any trader, having committed any act of bankruptcy, by any creditor of such trader, and upon his filing such affidavit, and giving such bond as is by law required, to issue his fiat, under his hand, in lieu of such commission, thereby authorising such creditor to prosecute his said complaint in the said court of Bankruptcy, *or to prosecute the same elsewhere,* before such discreet and proper persons, as the Lord Chancellor shall think fit to nominate and appoint, and that the persons, so nominated and appointed, shall have the like power and authority as if they were assigned and appointed special commissioners by virtue of a commission under the great seal." There is, therefore, clearly a distinction between fiats authorising proceedings in the court of Bankruptcy, and fiats authorising proceedings to be prosecuted elsewhere. The thirteenth section defines what that distinction is, by enacting that every such fiat, prosecuted in the said court of Bankruptcy, shall be filed and entered of record in the said court, and shall thenceforth be a record of the said court; and it shall thereupon be lawful for any one or more of the commissioners thereof, to proceed thereon, in all respects, as commissioners acting in the execution of a commission of bankrupt; save and except so far as

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such proceeding may be altered by virtue of this act.”

There is, therefore, no doubt whatever, that where the fiat has issued to the court of Bankruptcy, it is a proceeding in a court of law or equity. A still further distinction is drawn by the fifth section of 1 & 2 *W. 4. c. 56.*, which enables parties to enrol, in the court of Bankruptcy, proceedings before commissioners acting under a country fiat. I cannot bring my mind to assent to the proposition, that proceedings before commissions under a country fiat are, before enrolment, proceedings in the court of Bankruptcy. It therefore appears to me that the objection which has been taken, ought not to be allowed.

As to the objection raised to the item of 13*l.* 0*s.* 6*d.*, it seems to me that this sum ought to have been deducted out of the mortgage money, and that the assignees are not liable to be called upon to pay it. The objection to this item must therefore prevail.

BOSANQUET J. Before the recent statute, it is clear that proceedings in bankruptcy were not considered as proceedings in a court of law or equity, within the purview of the 2 *G. 2. c. 23. s. 23.* The only question is, whether the 1 & 2 *W. 4. c. 56.* has made any alteration in respect of proceedings before country commissioners. The first section of that act has, no doubt, declared that the court of Bankruptcy shall be a court of law and equity. It does not follow that proceedings in bankruptcy, conducted before commissioners in the country, and *not* in the court of Bankruptcy, are proceedings at law or in equity. The subsequent sections which have been referred to appear to me to be decisive. The twelfth and thirteenth sections point to two distinct classes of proceedings, viz. those in the court of Bankruptcy, and those elsewhere than in the court of Bankruptcy,—in other places, and before other persons, appointed by the Lord

Chancellor. The latter proceedings appear to me to be analogous to proceedings in bankruptcy before the statute. The proceedings in the court of Bankruptcy are to be filed. There is a different provision as to proceedings before country commissioners. The fourteenth section prescribes the manner in which country commissioners are to be appointed. The judges are to return to the Lord Chancellor the names of persons whom they consider well qualified, and from the names so returned, the commissioners are to be selected. The proceedings before those commissioners are not proceedings in the court of Bankruptcy; and I cannot see that the statute has made any change in the character of the proceedings, except where they are carried on in the court of Bankruptcy. I think, therefore, that there is no ground for saying that the proceedings in this case were before a court of law or equity; and that the delivery of a bill was unnecessary.

COLTMAN J. The court of Bankruptcy appears to me to be made a court of law and equity; and the argument would be strong if it had been addressed to the case of a town fiat; but I find no provision in the statute, having the effect of making proceedings under country fiats, proceedings at law or in equity. The argument which has been raised on the second section, — that the court of Review is to have superintending power over the commissioners in the country as well as in town, proves nothing; because it is nothing more than a provision for the exercise, by the court of Review, of the authority previously vested in the Lord Chancellor; and it is clear that the superintending power of the Lord Chancellor did not bring such proceedings within the 2 G. 2. c. 23. s. 23. Then, it is said, that the proceedings had become proceedings in a court of law or equity, by being subsequently recorded in the court of Bankruptcy, pur-

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suant to the provisions of the 3 & 4 W. 4. c. 114. s. 5. Though the proceedings may subsequently become matter of record in the court of Bankruptcy, that is immaterial, if they were not so at the time the charges were incurred or the action was commenced. If the action were brought after the proceedings had become proceedings in a court of law or equity, by being filed of record in the court of Bankruptcy, the bill would be taxable.

As to the 13*l.* 0*s.* 6*d.*, I think it clear that the plaintiffs are not entitled to recover.

ERSKINE J. I am of the same opinion. The fees, charges, and disbursements mentioned in the 2 G. 2. c. 23. s. 23. have been always held to mean fees, &c., in respect of proceedings in a court of law or equity. Here, no one item has been pointed out as being a claim for any fee, charge, or disbursement, except such as have been incurred in proceedings before country commissioners. The only question, therefore, is, whether commissioners sitting under a country fiat, are sitting in a *court of bankruptcy*. It was never so considered before the passing of the 1 & 2 W. 4. c. 56. It was always thought necessary to shew some act done in the court of Chancery, to bring a bill of costs within the 2 G. 2. c. 23. s. 23. (a) The act of the 1 & 2 W. 4. c. 56. has made a difference as to town fiats; because, under them, commissioners sit in a court of bankruptcy; but with respect to country commissioners, the act appears to have made no alteration, except by limiting the Lord Chancellor in the choice of country commissioners. Such commis-

(a) *Quære* how far proceedings before the Lord Chancellor in bankruptcy, are to be considered as proceedings in the court of Chancery. See *Lund*, *ex parte*, 6 Ves. jun. 782.; *Bryant*, *ex parte*, 1 Ves. & Bea. 211., 1 Rose, 288.; *Crowder v. Davies*, 3 Younge & Jerv. 433. 436.

sioners are not made part of the court of Bankruptcy. There is, therefore, nothing in this act which appears to create any distinction between the position of a solicitor under a country fiat, since the 1 & 2 *W. 4. c. 56.* and that in which he would have stood under a country commission before the passing of that act; when the only taxation to which the solicitor's bill was liable, was a taxation as between the assignees and the bankrupt's estate. If assignees chose unnecessarily to employ an attorney, they would be liable to him, even though they could not charge the estate. Though there is a general jurisdiction to order the solicitor's bill to be taxed, it does not follow, that all bills of costs which the Chancellor may order to be taxed, in the exercise of his general jurisdiction, will come within the 2 *G 2. c. 23. s. 23. (a)*

The plaintiffs are not entitled to recover the 13*l.* 0*s.* 6*d.*; because it is clear that the charges attending the sale, were payable out of the proceeds of the sale, and ought to have been deducted from the purchase money before the balance was paid over; and that they are not charges payable, by the assignees, out of the bankrupt's estate.

Rule absolute to reduce the verdict. *(b)*

(a) And see *Tarn v. Heys*, 1 *Stark. N. P. C.* 278., *Holt, N. P. C.* 378. n.; *Arrowsmith v. Barford*, 1 *Stark. N. P. C.* 279. n.

(b) And see the new bankruptcy law amendment act of 5 & 6 *Vict. c. 122.*

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An objection to an award on the ground of irregular and improper conduct on the part of the arbitrators, was held to be waived where such conduct had been known to the injured party three weeks before the award was made, without any objection being taken.

ASSUMPSIT, brought to recover a balance, including the amount of two bills of exchange, claimed to be due from the defendant to the plaintiff.

Plea: non assumpsit.

At the trial before *Tindal* C. J., at the sittings at *Westminster* after *Hilary* term, 1839, a verdict was entered for the plaintiff, damages 10,000*l.*, subject to the award, &c., of *Cochran*, a bookseller, and *Howell*, a surveyor, and if they should not agree, then to the award, &c. of *Hatchard*, a surveyor, as umpire, but who was not called upon to act. *Cochran* and *Howell* made their award on the 8th of *January* 1841, directing the verdict to stand for 2736*l.*, and ordering the defendant to pay the costs of the reference and award.

In *Hilary* term last, *Wilde*, Solicitor-General, obtained a rule, calling upon the plaintiff to shew cause, why the award should not be set aside. The grounds stated in the rule were, — first, that the arbitrators had been guilty of improper conduct, in hearing evidence in the absence of, and without notice to, the defendant or his attorney; secondly, that they had been guilty of improper conduct, in allowing the attendance of the plaintiff's attorney at certain meetings held by them upon the matters of the reference, in the absence of, and without notice to, the defendant or his attorney; thirdly, that one of the arbitrators had been guilty of improper conduct, in requiring payment to himself of a certain sum of money; lastly, that the arbitrators had been guilty of improper conduct, in conversing with the plaintiff's attorney, upon the matters of the reference, at meetings held in the absence of, and without notice to, the defendant or his attorney.

This rule was obtained upon two affidavits. The first was that of the defendant and one *Skelton*, which, after stating the action and the reference, alleged :— That various meetings were held, at which witnesses were examined and accounts produced. That on the 31st of *August* 1840, the cases of both parties to the reference were declared by the arbitrators, with the assent of counsel on each side, to be finished and closed. That on the 17th of *December* 1840, the deponents had an interview with *Cochran*, and were informed by him, that since the last meeting the arbitrators had re-examined one *Wool-lacott*, an accountant, (who had been previously examined as a witness on the part of the plaintiff, and who had formerly been employed by the defendant as a clerk,) in the presence of the plaintiff's attorney, but in the absence of the defendant, his attorney and counsel; and that *Howell* had, personally and alone, applied to Messrs. *Herries*, the bankers, for, and had obtained, evidence as to certain payments alleged by the defendant to have been made by him to the plaintiff; and also to Messrs. *Cocks* and Co., from whom no evidence had been obtained. That the defendant thereupon remonstrated with *Cochran* on the injustice of the arbitrators examining witnesses and obtaining evidence in the absence of himself and of his professional advisers; whereupon *Cochran* answered, that he and *Howell* had determined to examine witnesses privately, with or without the permission of the defendant, and would decide upon such evidence, whether it pleased the defendant or not. That *Cochran* required to be paid by the defendant a sum of 200*l.*, threatening that, unless his demand were complied with, the award would be unfavourable to the defendant. That on the 18th of *December*, *Cochran* informed the deponents that he had applied to one *Jarvis*, for evidence as to a cheque alleged to have been lent to the defendant by the plaintiff, and which had been pro-

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duced as a set-off against one of the bills of exchange put in on the part of the defendant; and that he had found that the cheque could not be successfully brought against the defendant. That *Cochran* said, on that occasion, that the evidence originally taken before the arbitrators went for nothing, and that the evidence which they were then procuring, would decide the case. That the deponents were informed and believed, that the plaintiff's attorney was present at several of the private meetings of the arbitrators, held for the purpose of going through the accounts, and determining upon the evidence put in by the plaintiff and defendant, and gave his opinion as to the sum to be awarded; and that he also took minutes of *Woollacott's* evidence, of which the defendant had been unable to obtain a copy. That the deponent believed that the plaintiff's attorney had obtained from the arbitrators, or one of them, information as to the times at which they intended to meet to consider their award, after the 31st of *August*, and that he was permitted to take an active part at several such meetings, but that no such information was given to the defendant, or, to the best of his knowledge and belief, to any person on his behalf; and that neither the defendant, nor any person on his behalf, ever attended at any meeting, or took any part in the matter of the said reference, or of their award, subsequently to the 31st of *August*. The other affidavit was that of the defendant's attorney, who deposed, that having obtained information of the reception of evidence by the arbitrators, as described in the above affidavit, he applied to *Howell* for a copy of the minutes of *Woollacott's* examination, which he had never received.

On the last day of *Hilary* term *Atcherley* Serjt. called on the rule for the purpose of discharging it; but it being objected that a rule for setting aside an award

could not be discussed on the last day of term, the rule was enlarged. (a)

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April 27. Cause was now shewn by *Atcherley* and *Channell* Serjts. (with whom was *Humfrey*), upon affidavits made by the two arbitrators, by *Charles Bignall*, the plaintiff's brother, by *Woollacott*, by *Hook*, a clerk of Messrs. *Herries* and Co., and by the plaintiff's attorney. The affidavit of the arbitrators stated, that after the parties had closed their cases, the arbitrators held a meeting on the 11th of *September* 1840, at which no person but themselves was present. That at this meeting they determined that they would call for, and insist upon the production of, all books of account, bankers' books, cheque books, and other books, matters, and things, relating to all transactions and dealings between the plaintiff and the defendant. That written notices were sent by the arbitrators to the attorneys of the plaintiff and the defendant, to produce the same at the next meeting of the arbitrators, fixed for, and held on, the 25th of *September*; on which day the arbitrators met, but the plaintiff's attorney only was in attendance. That another meeting was directed to take place, at the same house in which they were then assembled, — the *Exchequer Coffee House*, — on the 2d of *October*, and a notice was sent to the defendant, peremptorily requiring his attendance and the production of the books, the particulars of which had been specified in the former notice, and informing the defendant that, in the event of his non-attendance, the arbitrators would proceed in his absence. That the defendant not attending on the 2d of *October*, the meeting was adjourned till the 15th; notice whereof was given to the defendant, with an intimation, that unless he attended the arbitrators would proceed in his absence. That on

(a) *Antè*, p. 365.

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the 15th of *October* the arbitrators and the plaintiff's attorney attended, but no one appeared on the part of the defendant, though some books were produced as coming from the defendant, which had been left by mistake at another coffee-house in *Palace Yard*. That the plaintiff's attorney then delivered up to the arbitrators certain books and papers, as and for all the books and papers in his custody or power belonging to the plaintiff; whereupon the arbitrators proceeded in their reference. That the arbitrators found great difficulty in the examination of several bills of exchange, put in by the defendant, relating to the accounts in dispute between the parties, by reason of the defendant withholding several important books, amongst which were the balance books, the cheque books, and the bill books. That the arbitrators agreed that *Woollacott* should be recalled to identify the books produced on the part of the defendant, and to state what books, if any, the defendant possessed which had not been produced; and therefore they requested the plaintiff's attorney to procure *Woollacott's* attendance. That *Woollacott* appeared on the 4th of *December* 1840, and the arbitrators put some questions to him with respect to the books, and requested the plaintiff's attorney to take down in writing *Woollacott's* statement, while the arbitrators looked over the books which were then identified. That *Woollacott*, having spoken to the identity of some of the books, declared that there were two bill books, besides cheque books and balance books, which had not been produced, and which would have afforded important information. That doubts existing in the minds of the arbitrators as to the real date of some bills of exchange which had been produced by the defendant, by reason of a portion of their contents being cut off or obliterated, the arbitrators agreed that they would make inquiries of Messrs. *Herries* and Co. and of Messrs.

Cocks and Co. with respect to these bills; and also that they should make inquiries of *Jarvis* with regard to the cheque mentioned in the affidavit filed in support of the rule, in order that they might obtain a knowledge of facts which might guide them in their decision.

Cochran denied that he had demanded 200*l*.

The affidavit of the plaintiff's attorney stated, — that he had not at any time interfered with the deliberations of the arbitrators, and that he was not present at any of their meetings, after the respective cases of the parties had been closed, except for the purpose of producing certain books of account and papers, called for by the arbitrators; and that on the 4th of *December* 1840 he attended the arbitrators, at their request, with *Woollacott*, whom the arbitrators were desirous of re-examining as to the books kept by him, as clerk to the defendant, and whose examination he, on that occasion, took down, at the request of the arbitrators.

Atcherley Serjt. The correctness of the conclusion at which the arbitrators have arrived is not disputed, even by the affidavits upon which this rule was obtained; and the irregularities and misconduct stated in those affidavits have been fully answered. There is no ground for disturbing the settlement in which the arbitrators appointed by both parties have concurred after a protracted and expensive (*a*) investigation.

Channell Serjt., on the same side. The mode of conducting an inquiry before arbitrators is matter for the discretion of the arbitrators themselves, — persons selected by the parties on account of their supposed competency to conduct such inquiry. The court will not interfere,

(*a*) The plaintiff's costs, cluding 457*l*. 10*s*. paid to the taxed as between party and two arbitrators. party, amounted to 935*l*., in-

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on the ground that a witness has been recalled by the arbitrators, after the case was closed, no improper motive appearing on the part of the arbitrators, and the re-examination not being brought about by the management of the plaintiff or his attorney. If there was any irregularity in these proceedings, the defendant should not have lain by, taking the chance of a favourable decision, but should have stated his objection immediately. *Atkinson v. Abraham* (a) and *Hewlett v. Laycock* (b) were cited.

Shee Serjt. (with whom was *Wilde*, Solicitor-General) in support of the rule. The charge of corruption is answered; but the arbitrators were guilty of gross irregularity, amounting, though not to moral, yet to legal (c) misconduct; which is a sufficient ground for setting aside the award; *Phipps v. Ingram* (d). Several cases to this effect are collected in *Watson on Arbitration*, 2d ed., 224—227., as *Hick and Others, in re* (e); an *Anonymous Case* in 2 *Chitt. Rep.* (g); *Walker v. Frobisher* (h); *Featherston v. Cooper* (i), where Lord Eldon C. says: “No court could permit an arbitrator to decide so delicate a question, as whether a witness, examined in the absence of the other party, had an influence on him or not.” *Woollacott* was recalled for a very important purpose, and stated that the defendant had other books which ought to have been produced. This statement the defendant should have been allowed to meet, by producing the books supposed to be material, or by correcting or explaining the statement. The inquiries and examinations respecting the cheques and the bills of ex-

(a) 1 *B. & P.* 175.
 (b) 2 *Carr. & P.* 574. cor.
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 (c) *Vide Hall and Hinds,*
in re, post, 847.

(d) 3 *Dowl. P. C.* 669.
 (e) 8 *Taunt.* 694.
 (g) *P.* 44.
 (h) 6 *Ves. jun.* 70.
 (i) 9 *Ves. jun.* 68.

change ought not to have taken place without notice to the defendant. The notices stated in the affidavits filed by the plaintiff relate, not to the examination of witnesses, but to the production of books. *Atkinson v. Abraham* has been cited for the plaintiff; but, in that case, the judgment of the court, as delivered by *Eyre C.J.*, was this, — “Upon what ground in law is it that the second examination will impeach this award? This is clear, that if the arbitrator thought proper to ask the witness a question for his own information, after the evidence was closed, that circumstance will (would) not induce us to set aside the award. If, indeed, it appeared *that there was any surprise in it*, — that the second examination had been brought about through the management of the defendant’s attorney, that might be a good ground of objection. *Besides, this seems a matter of too little consequence to be opened again.*”

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TINDAL C.J. We cannot lose sight of this, — that for three weeks before the award was made, the defendant was aware of all the objections which he now urges to the court. On the 17th and 18th of *December* the defendant was informed by *Cochran* that *Woollacott* had been recalled, and that the arbitrators had sought for and obtained information from other persons. What right has he to lie by, and allow the arbitrators to make their award, and, when he finds the award to be against him, to move to set it aside upon this objection? There is another ground upon which it appears to me that we ought not to disturb the award. The case was closed on the 31st of *August*, and was afterwards reopened. Three specific notices were given to the defendant, who neglected to appear upon any of them. Might not the arbitrators reasonably conclude that the defendant meant to leave the case in their hands? If it had appeared that any injury had been done to the de-

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fendant in these *ex parte* proceedings, though he would have come with a bad grace, the court might have thought it right to reopen the matter. Nothing of the kind is, however, shewn by his affidavits. The plaintiff's attorney placed before the arbitrators the books which he had been required to produce, and he was present when *Woollacott* was examined by the arbitrators. This was all that was done by the plaintiff's attorney in the absence of the defendant. This case, as it appears to me, comes within *Atkinson v. Abraham*, where it was held to be no ground for setting aside an award, that one of the witnesses for the defendant was re-examined by the arbitrators after the case on both sides was closed, and the plaintiff's attorney was gone away; it not appearing that such re-examination had been brought about by the management of the defendant's attorney. I think the rule ought to be discharged.

BOSANQUET J. I am of the same opinion. If any irregularity was committed, it was one of which the defendant had full notice before the award was made. He had full notice, not only of the irregularity, but also of the intention of the arbitrators to proceed. Notwithstanding the case had been closed on both sides on the 31st of *August*, it was competent to the arbitrators, if they saw fit, to require the production of further evidence, either parol or documentary. The arbitrators did require the production of further documentary evidence, and a written notice was given to the defendant to attend. He did not attend; and a second notice was served; but still the defendant did not appear. The arbitrators did not proceed *ex parte* upon the second default, but caused a third notice to be served; still the defendant did not appear. These notices required, from each party, the production of certain books, &c. The plaintiff produced all his books, &c., and the defendant

produced some books, &c., on his part. The arbitrators then sent for an accountant who had been clerk to the defendant, and who had been already examined before them, in order to ascertain whether the books produced by the defendant were all the books kept by him. These proceedings are communicated to the defendant on the 17th and 18th of *December*. The defendant never desires to be informed what the result of these inquiries was; but he lies by until the award is made; two days after which he moves for this rule. If any irregularity had been committed, it should have been pointed out to the arbitrators before they made their award. I am, therefore, of opinion that the award cannot now be objected to; and that the rule, which has been obtained for setting it aside, must be discharged.

COLTMAN J. I am of opinion that, under the particular circumstances of this case, there is not sufficient ground for setting aside the award. That which weighs with me is, that three successive notices were given to the defendant, in the last of which it was stated, that unless the defendant attended, the arbitrators would proceed in his absence. As the defendant did not attend upon this notice, I do not see what conclusion the arbitrators could come to, except that the defendant abandoned the matter to them. Though I think that the arbitrators would have acted more wisely, had they given notice to the defendant of their intention to re-examine *Woollacott*, I cannot say that they were *bound* to do so, after the previous default of the defendant. At all events I think the defendant comes too late to complain after the award is made, he not having required the arbitrators to do any thing, upon being informed of the course which they had taken.

ERSKINE J. I cannot say that the arbitrators have proceeded with strict regularity. Though they gave

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notice to the defendant that, in the event of his non-attendance, they would proceed *ex parte*, that would be understood to imply rather that they would proceed to examine the documents, the production of which they had required, than that they meant to re-examine a witness. It does not, however, appear that any injury resulted to the defendant from that re-examination. The defendant put in some documents upon which the arbitrators were unable to proceed without further explanation from him, and, upon the non-attendance of the defendant, the arbitrators thought it right to make inquiries of different persons. The defendant has not shewn that he has suffered from these inquiries. I think, therefore, that we should do wrong to set aside the award, after the defendant has lain by, without taking an objection until after the award was made. Although, therefore, there may have been something which amounted to irregularity on the part of the arbitrators, I think that the irregularity is waived by the conduct of the defendant.

Rule discharged.

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SMITH v. TWOART.

May 1.

ASSUMPSIT, for use and occupation. Plea: non assumpsit. The particulars of demand were for one quarter's rent, from the 30th of *July* to the 30th of *October* 1840.

At the trial before *Maule* J., at the sittings at *Westminster* in this term, a verbal agreement, for letting the premises to the defendant, was proved; but it appearing that there had been a written memorandum between the parties, the memorandum was put in. The letting was for one year, with a quarterly reservation of rent, and an engagement, on the part of the plaintiff, to put the premises into repair before the occupation should commence. At the time of the agreement, the premises were in the possession of one *Matthews*, the plaintiff's former tenant. *Matthews* continued to occupy during the month of *August*, and received rent from an under-tenant, up to the 3d of *October*. The defendant never went to reside on the premises, but sent in a woman to clean the house; on which occasion he obtained the key from *Matthews*. It was not shewn whether the repairs were done by the plaintiff as stipulated; but it appeared that the defendant, thinking one of the rooms too cold, had it papered at his own expense. *Shee* Serjt. contended, on the part of the defendant, that no sufficient evidence of occupation had been given; and he cited *Pinero v. Judson*. (a) The learned judge, however, refused to stop the cause, and left it to the jury to say whether there had been any occupation by the defendant, giving the defendant leave

A party who had agreed to rent a house, sent in a woman to clean the house, and workmen to paper one of the rooms: Held to be sufficient evidence of occupation to go to the jury, in an action for use and occupation.

(a) 6 *Bingh.* 206. S. C. 3 *M. & P.* 497.

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to move to enter a nonsuit in case the jury should find a verdict for the plaintiff. The jury having returned a verdict for the amount of the quarter's rent,

Shee Serjt. now moved to enter a nonsuit. In order to support this action, an occupation by the defendant must be shewn. Actual occupation is indeed not necessary; *Pinero v. Judson*; but in the absence of actual occupation, a constructive occupation must be proved. [*Tindal* C. J. The words of the statute are "held or occupied," and "held or enjoyed."] A bare right to occupy,—as where a party agrees to take furnished lodgings, but does not enter,—is not sufficient. *Edge v. Strafford* (a), *Naish v. Tatlock*. (b) [*Tindal* C. J. How can it be said that there was no entry, when a woman was sent in to clean the house, and a room was papered, by the defendant?] At that time a person holding under the plaintiff was in possession. [*Tindal* C. J. If there was *any* evidence of an occupation, there can be no nonsuit.] In *Jones v. Reynolds* (c), the digging of holes for the purpose of examining the property was held not to be necessarily a taking of possession; *Woolley v. Watling*. (d)

TINDAL C. J. No ground has been laid for setting aside the verdict. The defendant was entitled to the possession, and had engaged to pay the rent; and there was some evidence from which a jury might infer occupation.

COLTMAN J. concurred.

(a) 1 *Cro. & Jerv.* 391.

(b) 2 *H. Bla.* 323.

(c) 7 *Carr. & P.* 335. In that case the defendant sent men upon the premises to dig holes before, and none after,

the agreement was signed. *S. C.*, not *S. P.*, 6 *N. & M.* 441., 4 *A. & E.* 805.

(d) 7 *Carr. & P.* 610. And see *Colebrook v. Tickell*, 4 *Ad. & Ell.* 916., 6 *N. & M.* 483.

ERSKINE J. If the party enters and has the means of occupying, the case is within the statute. Here, there was some evidence for the jury, and it was properly left to them; and upon that evidence they have found the fact of occupation.

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Rule refused. (a)

(a) It does not appear at what time *Matthews's* interest in the house expired. If it covered the period during which the room was papered and the woman sent in to clean, the defendant would, at the time of the constructive occupation, have only a reversionary interest, expectant, as to the right of possession, upon the determination of *Matthews's* interest, with a *mesne seignior*y during the continuance of that interest. As the agreement between the plaintiff and the defendant was not by deed indented, so as to create a right to make an immediate demise *by estoppel* (as to which

see *Doe dem. Bullen v. Mills*, 4 Nev. & Mann. 29.), such constructive occupation would, in the case supposed, be an occupation by the defendant, not by the permission and sufferance of the plaintiff, as alleged in the declaration, but by the permission and sufferance of *Matthews* or his under-tenant. On the other hand, if *Matthews* or his under-tenant wrongfully held over, an entry by the defendant would vest the possession in him; *Butcher v. Butcher*, 1 Mann. & Ryl. 220. And see *S. C. 7 Barn. & C. 399. Christy v. Tancred*, 9 Mees. & W. 438.

COTTAM and Another v. PARTRIDGE.

May 1.

A NOMINAL verdict was taken for the plaintiffs in this case for the sum of 44*l.* 12*s.* 8*d.* subject to the opinion of the court upon a special case to be stated. Some differences arose as to the facts to be settled, pending which, in April 1840, the defendant became bankrupt; whereupon the plaintiffs refused to proceed in the settlement of the special case.

Where a verdict is taken for the plaintiff, subject to a special case, and before the case is settled the defendant becomes bankrupt, the

court will not order—that a verdict shall be entered for the defendant unless the plaintiff will proceed with the case; but they will set aside the nominal verdict and direct a new trial, unless both parties consent to a *stet processus*.

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W. H. Watson, at the beginning of this term, obtained a rule, calling upon the plaintiffs to shew cause, why, in default of their proceeding to settle a special case to be submitted for the decision of the court, the verdict entered for the plaintiffs should not be set aside, and a verdict entered for the defendants, or why a new trial should not be had. Against which

G. Hayes now shewed cause. Some part of the rule which has been obtained will not be resisted. The court has authority to set aside the verdict which has been formally entered for the plaintiffs, and to direct a new trial; but it has no power to order a verdict to be entered for the defendant. Nor is the defendant entitled to the other alternative. The plaintiffs cannot be compelled to proceed with the special case, under the altered circumstances of the defendant. They would have no remedy against the defendant, and must prove against an insolvent unproductive estate. In *Medley v. Smith* (a) it was held, that where, after a nominal verdict, the plaintiff refused to prepare or complete a special case, he could not be compelled to do so, and that the only course is, to set aside the verdict, and send the case down to a new trial. *Tidd's Practice* 899. (b) This case is analogous to those which have arisen upon arbitrations, where a party has become bankrupt after the submission; *Woolley v. Kelly*. (c) Where a rule nisi has been obtained for judgment as in case of a nonsuit, it appears that if the plaintiff has commenced his action, knowing that the defendant was insolvent, the court will compel him to give a peremptory undertaking; but where the defendant has become bankrupt or insolvent since the

(a) 6 *B. Moore*, 153.

(b) 9th ed.

(c) 1 *B. & C.* 68. *S. C. per*

nom. Woolley v. Clark and Others, 2 *D. & R.* 158.

commencement of the action, or where the insolvency of the defendant has become known to the plaintiff after the commencement of the action, the court will not compel him to proceed. Here, the plaintiffs are ready to consent to a *stet processus*. [*Tindal* C. J. We cannot *force* parties to accept a *stet processus*.]

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W. H. Watson in support of the rule. The court has clearly power to order that a special case shall be stated, or in default thereof, a verdict entered for the defendant. In *Jackson v. Hall* (a) where, after a special case had been settled, the defendant refused to obtain a serjeant's signature, *Gibbs* C. J. said: — "If the court see grounds to believe that the defendant fraudulently withholds the case from being argued, they may order the postea to be delivered to the plaintiffs, and they may enter up judgment thereon; *that is the only course that can be adopted, when one party withholds that which it is his duty to perform*. The court would, in such cases, oblige parties to do justice." In *Taylor v. Gregory* (b), the court granted a rule for the plaintiff to enter up judgment and issue execution for the whole amount of the nominal verdict, which had been taken subject to a reference as to the amount of damages, unless the defendant would consent to the enlargement of the time for making the award, which the arbitrator had suffered to slip. [*Erskine* J. What power is there to enter a verdict for the *defendant*?] The special case would have contained a power to order the verdict to be entered for the defendant. *Medley v. Smith* does not militate against this application. That was an action of replevin, in which a verdict could not be ordered to be entered for rent and damages which had never been assessed by a jury. [*Coltman* J. The

(a) 2 B. Moore, 478.

(b) 2 B. & Ad. 774.

1841. judgment might have been entered up at common
 ——— law.](a) In *Wilkinson v. Time*(b), Coleridge J. directed
 COTTAM that judgment should be entered up, and execution
 v. issued for the amount of the nominal verdict, unless the
 PARTRIDGE. defendant would consent to an enlargement of the time
 for making the award. [Tindal C. J. In that case, and
 in *Jackson v. Hall* and *Taylor v. Gregory*, a conditional
 verdict had been taken for the plaintiff. Here, you
 want to *alter* the verdict.]

TINDAL C. J. The cases cited on the part of the
 defendant contain expressions which are somewhat
 strong in support of the view for which he contended;
 but they all appear to be cases in which there was
 an unjustifiable, as well as an unnecessary, refusal to
 proceed. Here, there is no breach of faith; but a new
 state of things has arisen. We ought not to force the
 plaintiffs to incur additional, and probably useless, ex-
 pense; nor, on the other hand, can we deprive the
 defendant or his attorney of his remedy to recover his
 costs, supposing the action to be unfounded. All that
 we can do is, to remove the bar which at present exists,
 by setting aside the verdict which has been entered for
 the plaintiffs.

COLTMAN J. I should have been glad if any au-
 thority had been found to support the position con-
 tended for on behalf of the defendant. None such has
 been produced; and I think that all that the court can
 do is, to grant a new trial.

ERSKINE J. I am also of opinion that the court has
 no authority to order a verdict to be entered for the

(a) For a return of the cattle
 or goods taken, *vide* 1 *Wms.*
Saund. 195 b. n.

(b) 4 *Dowl. P. C.* 37.

plaintiff. At the same time, I think we ought not to allow the nominal verdict, that was taken for a purpose which the plaintiffs now abandon, to stand in the way of a new trial. Where a rule for a judgment as in case of a nonsuit, is refused or discharged, the defendant has it in his power to carry down the cause for trial by proviso. The proceedings upon such a rule, therefore, have no analogy with the case before the court.

Rule absolute for a new trial.

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May 7.

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CERTAIN disputed matters of account between these parties, were referred to the arbitrament of two merchants, named by the parties, and a third, chosen by the two, or of any two of them; the costs to be in their discretion, with a clause in the agreement of reference for making the submission a rule of court.

Hall admitted a balance of 143*l.* 15*s.* 11*d.* to be due from him to *Hinds*, and the only contention before the arbitrators was, whether the balance due to *Hinds* exceeded that sum. Upon an investigation, which depended wholly upon accounts in writing, rendered by one party to the other, it appeared, to the satisfaction of the arbitrators, that 75*l.* 4*s.* 7*d.* beyond the 143*l.* 15*s.* 11*d.*, was due from *Hall* to *Hinds*. By mistake, the arbitrators, instead of *adding* these two sums together, *deducted* the 75*l.* 4*s.* 7*d.* from the 143*l.* 15*s.* 11*d.*; and, by another mistake, they directed

Where a gross mistake is made by arbitrators, though not apparent on the face of the award, the court will sometimes set aside the award, as for *misconduct* of the arbitrators. As where *A.* claiming two sums to be due to him from *B.*, the contention before the arbitrators is, merely whether *A.* is

entitled to both or to one only of those sums, and the arbitrators, meaning to give *A.* both sums, instead of adding them together, deduct the smaller from the larger, and instead of directing the payment to be made by *B.* to *A.*, award that the payment shall be made by *A.* to *B.*

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that 68*l.* 11*s.* 4*d.*, being the sum remaining after such deduction of the 75*l.* 4*s.* 7*d.* out of the 143*l.* 15*s.* 11*d.*, should be paid by *Hinds* to *Hall*. Upon this double blunder being pointed out to the arbitrators, they requested *Hall* to consent to the award being set right; but with this request *Hall* refused to comply.

Bompas Serjt., in *Michaelmas* term last, obtained a rule calling upon *Hall* to shew cause why the award should not be set aside, on an affidavit of these facts, made by two of the arbitrators; the arbitrator appointed by *Hall* refusing to join in such affidavit, though he verbally expressed his assent to the statements sworn to by his co-arbitrators.

Channell Serjt., in *Hilary* term, shewed cause, upon an affidavit which, without denying the facts above stated, alleged that *Hall* had paid 61*l.* 12*s.*, the costs of the award and of the agreement of reference, upon taking up the award, in which it was directed that those costs should be paid in equal moieties; and, further, that *Hinds* being resident abroad (*a*), *Hall* would be unable to recover the moiety from him.

The award being good *ex facie*, the court has no power to interfere. In *Gordon v. Mitchell* (*b*) it was held, that where an award is clear upon the face of it, the affidavit of an arbitrator, to explain the intention, is inadmissible. In *Williams v. Jones* (*c*) it was held, that an award cannot be questioned upon grounds not appearing upon the face of the award, or in any paper annexed thereto. In *Jones v. Corry* (*d*), a statement of matters not appearing in the award, was received and acted upon by this court; but in *Doe dem. Oxenden v.*

(*a*) *Vide infra*, 853 *n.*

(*b*) 3 *B. Moore*, 241.

(*c*) 5 *Mann. & Ryl.* 3.

(*d*) 5 *New Cases*, 187.

Cropper (a), the court of Queen's Bench, intimating that the course which had been pursued in *Jones v. Corry* might lead to inconvenience, refused to correct an award by a written statement of the grounds upon which the arbitration had proceeded, delivered by him together with the award. In *Ward v. Dean* (b) it was held, that an arbitrator who had directed that the costs of the reference and award should be paid by the *defendant*, his intention being that they should be paid by the *plaintiff*, could not set the award right in that respect after it had been executed. *Henfree v. Bromley* (c) proceeded upon the same principle. If such a correction were allowed, it would follow that arbitrators might make a new award, from time to time, until the period limited by the submission for making their award had expired. In a late case, the court of Exchequer refused to correct an error in figures made by counsel in indorsing upon his brief the amount of a verdict taken by consent. (d) If the court had the jurisdiction contended for, they would not exercise it except upon the terms of relieving *Hall* from *Hinds's* share of the expense of taking up the award.

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Wilde Solicitor General, in support of the rule. [*Tindal* C. J. Is it impossible in this case to have an assent to the sending back of this case to the arbitrators?] Quite so; the intention avowedly being, to take advantage of this blunder. This is an application to the equitable jurisdiction of the court, and there can hardly be a clearer case for the exercise of that jurisdiction. Gross mistake, either apparent on the face of the award, or to be made out by evidence, is stated by Lord *Thurlow* C.

(a) 2 P. & D. 490. 493., since reported 10 A. & E. 197. v. *Elton*, 8 East, 54.; *Moore v. Butlin*, 7 A. & E. 595., 2 N.

(b) 3 B. & Adol. 234.

& P. 436.

(c) 6 East, 309., 2 J. P. Smith, 400. And see *Ervino*

(d) Not reported.

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as one of the grounds for setting aside awards; *Knox v. Symmonds* (a); “but in case of mistake, it must be made out to the satisfaction of the arbitrator.” In *Anderson v. Darcy* (b), Lord Eldon C. says, “the rule as to mistake is, that where there is clear and distinct evidence of mistake, the nature of it, and that it was made out to the satisfaction of the arbitrators, — as to which Lord Thurlow in *Knox v. Symmonds* insisted upon having their affidavits, — courts both of law and equity will interfere, the one by setting aside the award, the other by refusing to make it a rule of court.” (c) *Watson on Arbitration*, 414. *Henfree v. Bromley* is an authority in favour of the general jurisdiction; as it was there held that in the case of a mistake on the part of the arbitrator in putting down one sum for another, the award may be set aside by the court, but cannot be corrected by the arbitrator, who, upon making his award, has exhausted his authority, — he is *functus officio*. [Maule J. The plaintiff, in that case, probably consented to the setting aside of the award.] The jurisdiction of the court was never questioned before. Upon such an application it possesses all the power of a court of equity. It is not sought here to correct an error of the arbitrators’ mind, but merely of their hand or pen. It never was a question *in whose favour* the award was to be made. From the beginning it was admitted that a balance was due to *Hinds*; and the *amount* of that balance was the sole matter of discussion. This case differs from that of *Gordon v. Mitchell*; the distinction is, between errors of judgment and of the mind, and errors in which neither

(a) 1 *Ves.* jun. 369.

(b) 18 *Ves.* jun. 447.

(c) The *award* is never made a rule of court; and any miscarriage of the arbitrators would be no ground for refusing to make the *submission* a rule of court. Such a rule is even necessary, in order to give the

court jurisdiction to deal with the award in any way. In cases within the 9 & 10 W. 3. c. 15. the first section directs, that the submission *shall or may* (7 A. & E. 939.) be entered of record, and that a rule *shall* thereupon be made, *post* 850.

the judgment nor the mind are implicated. [*Maule J. Hall* never made any claim of a balance due to him?] Never. The case rested entirely upon written documents; and the only question was, how much should be added to an account admitted by *Hall* to be due from him to *Hinds* upon the balance of accounts between them. *Hall* after having claimed nothing, would not have paid 61*l.* 12*s.* for the award, unless he had received an early intimation of its contents. My brother *Channell* and myself have been consulting together, and we hope we shall be able to come to an arrangement before *Monday*. [*Tindal C. J.* We shall be very glad.]

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No arrangement having been come to, TINDAL C. J. now delivered the judgment of the court.

This was a case in which certain disputes between *Hinds* and *Hall* had been referred to the decision of two arbitrators, and, in case of their disagreement, to a third to be named by them. It was admitted, on the part of *Hall*, that 143*l.* 15*s.* 11*d.* was due from him to *Hinds*; but the latter claimed a larger sum before the arbitrators; and after an investigation of the matters in difference, the arbitrators found that a further sum of 75*l.* 4*s.* 7*d.* was due from *Hall*. Instead, however, of adding these two sums together, and directing *Hall* to pay the aggregate sum to *Hinds*, which would have been 219*l.* 0*s.* 6*d.*, the arbitrators, by mistake, deducted the 75*l.* 4*s.* 7*d.* from the 143*l.* 15*s.* 11*d.*, and, by a still further mistake, directed by their award that *Hinds* should pay the difference to *Hall*.

Under these circumstances, *Hinds* makes an application to this court to set the award aside; and we certainly had hoped, and had expected, that upon this exposition of the circumstances of the case, *Hall* would have, consented, at once, to send the matter back to be rectified by the arbitrators. The motion, however, has been opposed, on the authority of various cases, tending

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to lay down the rule, that where the award expresses a clear intention of the arbitrators, the court will not interfere to set it aside on the ground of any mistake in the award, or any statement of the real intention of the arbitrators, though brought forward by themselves.

We cannot, however, help thinking, that in a case circumstanced like the present, the court must have some power to give a remedy, rather than that so manifest a failure of justice should take place. And it would really bring the administration of justice, in this particular instance, into scandal and contempt, if such remedy were wanting, or, if existing, it were not applied. The case, indeed, is the stronger, because, unless the award be set aside, it seems, at the least, extremely doubtful whether, in an action upon the award itself, any defence could be made (*a*); so that, unless the injured party succeed in this application, he will be remediless altogether.

We consider the mistake in the present case to be a mere clerical mistake, by which the arbitrators have expressed, on the copy of the award delivered out, not the intention of their own minds, but one widely different. At the same time, the mistake and act of carelessness is so gross as to amount, though not in a moral point of view, yet in the judicial sense of that term, to *misconduct* on the part of the arbitrators. *Lata culpa* or *crassa negligentia*, both by the civil law and our own, approximates to, and in many instances cannot be distinguished from, *dolus malus*, or misconduct (*b*); and we think we do not extend the jurisdiction of the court beyond its proper limits, when we give relief in a case under these very peculiar circumstances, by holding this

(*a*) That a mistake or misconduct of the arbitrators cannot be pleaded to an action on the award, see *Veale v. Warner*, 1 Saund. 326.; *Wills v. Mac-carmick*, 2 Wils. 148.; *Braddick*

v. Thompson, 8 East, 344., 1 Wms. Saund. 327 b. n. (3).; *Grasebrook v. Davis*, 5 B. & C. 534., 8 D. & R. 295.

(*b*) See *Vinn. Instit. Imper. Comment.* lib. 3. tit. 15 b. 605.

case to fall within the acknowledged power of the court to relieve against the *misconduct* of the arbitrators. (a)

As to the sum paid by *Hall* to take up the award, we do not feel ourselves called upon to interfere. If the award is set aside, the consideration would seem to have failed for which that money was paid. (b) However, we give no opinion on that point; but under the circumstances stated in the affidavit, we do not feel ourselves called upon to interfere as to such payment. The rule for setting aside the award must be made absolute.

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Rule absolute.

(a) By 9 & 10 W. 3. c. 15. s. 2. an award may be set aside where arbitrators *misbehave themselves*.

(b) The action, if maintain-

able, would appear to lie, not against *Hinds*, (who was stated, *suprà*, 848, to be abroad,) but against the arbitrators, who received the 61*l.* 12*s.*

WERNER, Administrator of the Goods, &c. of
C. TRIQUET, deceased, left unadministered
by **M. TRIQUET**, deceased, Administratrix, &c.
v. **HUMPHREYS**.

May 5.

DEBT, for goods sold and delivered by the intestate, and on an account stated with the intestate; and for goods sold and delivered by, and upon an account stated with, *M. Triquet*, deceased, as administratrix.

A coat ordered of one *A.*, a tailor, by *B.* was cut out, tacked together, and

tried on, in *A.*'s lifetime, but was finished and delivered, after his death, by his administratrix. The jury were told by the undersheriff that the coat, if it was so nearly finished in *A.*'s lifetime as to require very little to be done to it afterwards, was sold and delivered by *A.*

Held, a misdirection; and it was said that the price of the coat might be recovered under a count for goods sold and delivered by the plaintiff as administratrix. (a)

(a) *Vide post*, 857 (a).

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The defendant pleaded, first, to the whole declaration, *nunquam indebitatus*; secondly, to the first two counts, payment; and thirdly, to the same counts, a set-off; on which pleas issue was taken and joined.

At the trial before the under-sheriff of *Middlesex*, in *January* last, it appeared that the action was brought to recover the sum of 4*l.* 16*s.* the price of a coat, which the intestate had been employed to make for the defendant. The coat, which was made out of *Triquet's* own materials, had been tacked together, and tried on by the defendant, previously to *Triquet's* death, but was not completed and delivered until four days afterwards. *Triquet* having died intestate, his widow too obtained letters of administration; and on her death (a) the plaintiff, who was her father, took out administration *de bonis non*.

It being admitted that the set-off was an answer to the first two counts, the question was, whether the plaintiff could recover on the third. The under-sheriff told the jury, that if they were of opinion that the coat was so nearly finished in the intestate's lifetime, as only to require some trifling work to be done to it afterwards, they ought to find for the defendant; and he left it to them to say whether the coat was not made and completed "or so nearly so" in the lifetime of the intestate, as to be a coat sold and delivered by him. The jury having found a verdict for the defendant,

Channell Serjt., in *Hilary* term last, obtained a rule nisi for a new trial, on the ground of misdirection

Bompas Serjt. now shewed cause. The result of the evidence was, that the coat was substantially finished and delivered in the intestate's lifetime. There was no contract with the administratrix, so as to enable the plaintiff to recover on the third count. If the coat was

(a) Whether testate or intestate, would be immaterial.

sold by the intestate and delivered after his death, that ought to have been alleged in the declaration, and the defendant is consequently entitled to a verdict on the plea of *nunquam indebitatus*.

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Channell Serjt. in support of the rule. There was no sale of the coat in the lifetime of the intestate. There was a delivery and an acceptance of it four days after his death. The coat not being finished in the intestate's lifetime, clearly passed to his administratrix, as part of his assets. The defendant could not have maintained trover against her for the coat, even if he had tendered the price; and in case it had been accidentally destroyed the administratrix must have borne the loss. It is clear that the coat was completed by her; and, therefore (a), the defendant entered into a new contract with her. In *Marshall v. Broadhurst* (b) a testator, having contracted to build a wooden gallery, died before it was begun, and it was erected by his executors after his death. It was held, that they were entitled to sue for work, and labour done, and materials found by them, as executors; for the sum recovered would be assets.

TINDAL C. J. It appears to me upon the evidence, that the coat was in an unfinished state at the death of the intestate; and if so, no property in it had passed to the defendant, but it vested in the administratrix, and it was in her option whether to complete it or not. (a) And if the coat had been accidentally destroyed by fire, the loss would not have fallen upon the defendant, but upon the administratrix; which is one of the tests to shew that no property in it had vested in the former. (c) Then, if the property in the coat vested in the administratrix on the intestate's decease, and she finished

(a) *Vide post*, 857. (a)(c) *Vide ante*, 654. (d)(b) 1 *Tyrwh.* 348., 1 C. & J. 403.

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— coat was delivered under a new contract made by her
WERNER with the defendant. I think the third count in the de-
v. claration, which alleges a sale and delivery by the ad-
HUMPHREYS. ministratrix, exactly meets the case. The summing up
of the under-sheriff was clearly incorrect; for he with-
drew the attention of the jury from that count; and,
consequently, there must be a new trial.

BOSANQUET J. The question is, whether there was not a sale and delivery of the coat by the administratrix, so as to entitle the plaintiff to recover upon the third count. It appeared to be clear upon the evidence, that the coat was not completed in the intestate's lifetime, and that it was not delivered until some days after. The under-sheriff was undoubtedly wrong in his direction to the jury.

COLTMAN J. The question is, whether the plaintiff was not entitled to recover upon the third count; and that depends upon whether there was any transfer of the property in the coat in the intestate's lifetime. It seems to me that there was not. The coat was made of the intestate's own materials, and the trying of it on effected no transfer of the property, which remained in the intestate until his death. When the coat was afterwards delivered to the defendant by the administratrix in a finished state, it was a delivery by her, and formed a good foundation for an action for goods sold and delivered by her, in her representative character. It is clear that the defendant could not have maintained trover for the coat at the death of the intestate.

ERSKINE J. There was no evidence of a sale of the coat by the intestate in his lifetime. It appeared that

the coat was made out of the intestate's own materials, and that after it was tacked together, it was tried on by the defendant. Although that shewed an *intention* on the part of the intestate to appropriate that identical coat to the defendant, it is clear that no property in it passed to the latter in the lifetime of the former, but that it vested in the administratrix, and that the subsequent delivery was a sale and delivery by her in that character.

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Rule absolute. (a)

(a) Though no property passed in the lifetime of the intestate in the particular coat, or in the materials, and though the property in those materials vested in the administratrix, and might have been completed by her and sold and delivered to another person, against whom she might clearly have declared as upon a *new contract* of sale and a consequent delivery, by her as administratrix; yet, as the intestate had accepted the order, the administratrix, if she had assets, was bound to supply a coat at the price agreed upon, supposing the price to have been fixed, or, upon payment of a reasonable sum, if the price had not been fixed. The coat actually delivered would be delivered in discharge of that obligation, and not (as appears to be the legal effect of the allegation in the third count) upon a contract *wholly* with the administratrix.

The claim clearly could not be supported on the first count; and if the plaintiff had declared as for goods sold by the intestate and delivered by the administratrix, as suggested (*supra*, 854, 855.), the objec-

tion would have arisen, that the intestate had never *sold* any specific coat; and where *non constat de corpore*, there can be no sale.

Quære, whether, under the circumstances existing in the principal case, the safer course would not have been to declare *specially*. In the converse case, where goods or work are ordered by the testator, and the contract is completed by the tradesman in the time of the executor, it is said, in *Williams on Executors*, 8d ed. 1522., and, it would appear, very justly, "that the declaration for such goods or work, instead of containing the common counts for goods sold to, and work done for, *the executor*, should state the contract to have been entered into with the testator, and that, at the time of his death, the work was incomplete, but was finished afterwards, and that the defendant, as executor, then promised to pay."

Quæcunque viâ datâ, the plaintiff would be entitled to his rule to set aside the verdict on the ground of misdirection.

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and delivered it afterwards, it seems to me that such coat was delivered under a new contract made by her with the defendant. I think the third count in the declaration, which alleges a sale and delivery by the administratrix, exactly meets the case. The summing up of the under-sheriff was clearly incorrect; for he withdrew the attention of the jury from that count; and, consequently, there must be a new trial.

BOSANQUET J. The question is, whether there was not a sale and delivery of the coat by the administratrix, so as to entitle the plaintiff to recover upon the third count. It appeared to be clear upon the evidence, that the coat was not completed in the intestate's lifetime, and that it was not delivered until some days after. The under-sheriff was undoubtedly wrong in his direction to the jury.

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WERNER
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The claim clearly could not be supported on the first count; and if the plaintiff had declared as for goods sold by the intestate and delivered by the administratrix, as suggested (*supra*, 854, 855.), the objec-

tion would have arisen, that the intestate had never *sold* any specific coat; and where *non constat de corpore*, there can be no sale.

Quære, whether, under the circumstances existing in the principal case, the safer course would not have been to declare *specially*. In the converse case, where goods or work are ordered by the testator, and the contract is completed by the tradesman in the time of the executor, it is said, in *Williams on Executors*, 8d ed. 1522., and, it would appear, very justly, "that the declaration for such goods or work, instead of containing the common counts for goods sold to, and work done for, *the executor*, should state the contract to have been entered into with the testator, and that, at the time of his death, the work was incomplete, but was finished afterwards, and that the defendant, as executor, then promised to pay."

Quæcunque viâ datâ, the plaintiff would be entitled to his rule to set aside the verdict on the ground of misdirection.

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May 5.

W. LAMBERT and N. his Wife, and H. CURLING, the said N. LAMBERT and H. CURLING being Administratrixes of, &c. of E. U. HUTCHINSON, deceased, v. C. M. HUTCHINSON, Administratrix of, &c. of BURY HUTCHINSON, deceased.

Where a cause had been referred at nisi prius, and no step had been taken from May 1837 to January 1841, and the arbitrator had inadvertently omitted to enlarge the time for making his award, the court refused to interfere.

Semble, by Tindal C. J., that where an arbitrator has power to enlarge the time, and omits to exercise his power, the courts have no authority to enlarge the time under the 3 & 4 W. 4. c. 42. s. 39.

THIS cause and all matters in difference between the parties, were referred at the *Taunton* spring assizes 1837, under the usual order by the judge, who was not a judge of this court. The arbitrator, after holding several meetings, the last of which took place on the 15th of May 1838, enlarged the time for making his award until *Easter* term 1839; but owing to some inadvertence the time was not subsequently enlarged. Nothing was done under the reference from the 15th of May 1838 to the 25th of January 1841. The plaintiff *W. Lambert* died on the 15th of November 1839; the defendant had married subsequently to the 15th of May 1838.

Bompas Serjt., in *Hilary* term last, obtained a rule nisi on the part of the defendant, to enlarge the time for making the award, upon an affidavit which was entitled in the cause and in this court.

Channell Serjt. now shewed cause. The question is, whether this court has power to interfere under the 3 & 4 W. 4. c. 42. s. 39 (a). The court empowered under

(a) Which enacts, "That the power and authority of any arbitrator or umpire, appointed by or in pursuance of any rule of court, or judge's order, or order of nisi prius, in any action now brought or which shall be hereafter brought, or by or in pursuance of any sub-

mission to reference containing an agreement, that such submission shall be made a rule of any of His Majesty's courts of record, shall not be revocable by any party to such reference without the leave of the court by which such rule or order shall be made, or which shall

that section to enlarge the time clearly means the court by which the rule or order of reference is made. Here it does not appear that the order is a rule of this court. [*Tindal* C. J. If the order has not been made a rule of this court, it seems to me that we cannot interfere.] The plaintiffs will waive that point. The decisions upon the statute are conflicting. In *Burley v. Stephens* (a), the arbitrator having accidentally omitted to enlarge the time for making his award, pursuant to the power given him by the order of nisi prius, the court of Exchequer, when the case was first before them, refused to interfere. In *Potter v. Newman* (b), however, *Parke* B. intimated that he had changed his opinion. And on *Burley v. Stevens* (c) coming again before that court, the same learned judge said, "I certainly was under the impression, from not having read the clause with attention, that the court had power to enlarge the time only where there had been a revocation of the arbitrator's authority; but I have now satisfied my mind that the court possesses the power in all cases." But in *Doe dem. Jones v. Powell* (d) *Patteson* J. ruled that he had no authority to enlarge the time, where, as here, a power had been given to the arbitrator to do so, which he had neglected to exercise. Undoubtedly the court of Exchequer, when the point came distinctly before them in *Parbury v. Newnham* (e), held "that they had still the power,

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be mentioned in such submission, or by leave of a judge; and the arbitrator or umpire shall and may, and is hereby required to proceed with the reference, notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference; and that the court, or any judge thereof, may, from

time to time, enlarge the term for any such arbitrator making his award."

(a) 4 Dowl. P. C. 255.

(b) Tyrwh. & G. 29., 2 C. M. & R. 742.

(c) Tyrwh. & G. 413., 1 M. & W. 156.

(d) 7 Dowl. P. C. 539.

(e) 7 M. & W. 398., 9 Dowl. P. C. 288.

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under the act of parliament, to enlarge the time for making the award ;” but it is submitted, that their decision is not warranted by the language of the statute. [Tindal C. J. Where the rule or order of reference contains no power to enlarge the time, it is a very useful provision ; as it enables the court, or a judge, to supply the defect. But I doubt whether the statute empowers the court, or a judge, to interfere where the arbitrator has power to enlarge, but he has inadvertently permitted the time to expire without exercising his power.] Even supposing the court has power to enlarge the time, it will not, under the circumstances of this case, interfere, after the long delay that has occurred, and the changes that have taken place among the parties.

Bompas Serjt., in support of the rule, relied on *Parbery v. Newnham*, as being directly in point.

TINDAL C. J. So long a time has elapsed since any step has been taken under the order of reference in this case, that even if the court has power to interfere, I do not think it would exercise a sound discretion in doing so. I have a strong opinion upon the statute, but upon that point it is unnecessary to give any decision.

BOSANQUET, COLTMAN, and ERSKINE JJ. concurred.

Rule discharged.

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May 20.

IN 1827, the defendant being indebted to the plaintiff in 42*l.*, accepted a bill for the amount, drawn by one *Frederick Palmer*, in favour of the plaintiff. In 1838 the defendant was discharged out of custody, and adjudged to be entitled to the benefit of the insolvent debtor's act as to the debt of 42*l.*, which had been duly inserted in the schedule to his petition. In the same year, the plaintiff obtained judgment against *Palmer* in an action on the bill, and took him in execution for the debt and costs recovered in that action. Afterwards the defendant applied to the plaintiff for *Palmer's* release from prison upon payment of a certain composition. The plaintiff consented to his discharge upon the defendant's executing a warrant of attorney to secure the payment of the balance of the debt and costs for which *Palmer* was in custody, and also the amount of certain costs which the plaintiff had incurred in opposing the defendant's discharge under the insolvent debtor's act. In *September* 1839, the defendant, accordingly, executed the warrant of attorney in question for 52*l.* 11*s.* 3*d.*; and *Palmer* was released. Afterwards the defendant paid the plaintiff the sum of 15*l.* on account. On the 25th of *March* 1841 the plaintiff signed judgment, and issued a *ca. sa.*; upon which the defendant was taken in execution for 37*l.* 11*s.* 3*d.* the balance. The defendant thereupon paid 46*l.* into the hands of the sheriff of *Northamptonshire*, under a protest against the legality of the arrest.

Bompas Serjt., upon an affidavit of these facts, obtained a rule, calling upon the plaintiff to shew cause, why the warrant of attorney given by the defendant,

B. gives to *A.* a bill of exchange, drawn by *C.* and accepted by *B.*, for 42*l.*, owing from *B.* to *A.* *B.* obtains his discharge under the insolvent debtors' act. *A.* sues *C.*, and takes him in execution. To obtain *C.'s* discharge, *B.* gives *A.* a warrant of attorney for 52*l.* 11*s.* 3*d.*, made up of the debt and costs, recovered against *C.*, and *A.'s* costs of opposing *B.'s* discharge.

The warrant of attorney is available for the costs of the action against *C.*, and for the costs of opposing *B.'s* discharge, but not for the amount of the debt on the bill recovered against *C.*

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the judgment signed, and the writ of *capias ad satisfaciendum* issued thereon, should not be set aside; and why the sheriff of *Northamptonshire* should not refund, to the defendant, or to his attorney, the sum of 46*l.*, paid into his hands by the defendant, under protest, on his caption thereon, — on the ground that the warrant of attorney had been given as a security for the payment of a debt, in respect of which the defendant had become entitled to the benefit of the insolvent debtors' act, then in force, namely, the 7 G. 4. c. 57.

The debt for which the warrant of attorney was given having been included in the defendant's schedule, he is entitled to be relieved against this instrument and the proceedings which have been had under it, by virtue of the provisions of 7 G. 4. c. 57. s. 61., the language of which is not, in substance, distinguishable from that of 1 & 2 Vict. c. 110. s. 91. *Smith v. Alexander* (a), *Evans v. Williams*. (b) The sheriff has obtained his discharge from this execution under the interpleader act. An application similar to the present has been made to a judge at chambers, who has referred the parties to the court.

May 1.

Channell Serjt. now shewed cause, upon an affidavit stating that the warrant of attorney was given for the debt and costs recovered against *Palmer*, and also for the costs of opposing the defendant's discharge under the insolvent debtors' act; and that upon the execution of that warrant of attorney, *Palmer* was discharged out of custody under a *ca. sa.* for such debt and costs.

Upon *Palmer's* discharge the judgment against him was satisfied. His discharge, therefore, formed a new consideration for the warrant of attorney, independent of the original debt, of the same amount, due from

(a) 5 Dowl. P. C. 13.

(b) 1 Cro. & M. 30.

the defendant. The statute could not be avoided by giving a security for the old debt mixed up with a new debt. Here, it is not given for the old debt, but for the discharge of *Palmer*; which was a consideration, not only of loss to the plaintiff but of benefit to the defendant, who would have been liable to *Palmer* notwithstanding his discharge. *Powell v. Eason* (a), *Hocken v. Browne* (b), *Abbott v. Bruere*. (c) [Coltman J. There is a difference in this respect between the bankrupt and the insolvent act.] That difference was considered in *Hocken v. Browne*. *Abbott v. Bruere* went beyond *Hocken v. Browne*; it being there held, that the liability to the surety continued in respect of arrears of annuity which had accrued due *before* the insolvent's discharge. The fallacy consists in supposing that the warrant of attorney was given partly for the purpose of securing the old debt. But the warrant of attorney was given to secure also costs for which the defendant was not liable at the time of his discharge. There is no difference in the wording of 1 & 2 Vict. c. 110. ss. 90 and 91. and that of the previous insolvent act, 7 G. 4. c. 57. ss. 60 and 61. By the 7 G. 4. c. 57. s. 61., by which this case must be governed, it is enacted that after any person shall have become entitled to the benefit of this act by any such adjudication as aforesaid, no writ of *fiери facias* or *elegit* shall issue on any judgment obtained against such prisoner *for any debt or sum of money with respect to which such person shall have so become entitled*. However the case may stand with respect to the amount of the original debt, the execution is unquestionably good to the extent of the costs of the action against *Palmer*, and of the opposition to the defendant's discharge. (d) Thus, in *Smith*

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(a) 8 Bingham. 23.

(b) 4 New Cases, 400.; 6 Scott, 194.

(c) 5 New Cases, 598.; 7 Scott, 753.

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(d) Where a bond is given for a valid demand, and also for a debt made void by statute, the whole bond is void; *Lee v. Coleshill*, Cro. El. 529.,

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v. *Alexander* (a), which was cited on moving for this rule, the court set aside the warrant of attorney, and the judgment to the extent of the debt for which the defendant had been discharged under the 7 G. 4. c. 57. s. 61., but upheld the security with respect to a new debt included in the warrant of attorney. In *Evans v. Williams* (b), there cited, no fresh credit had been given. In *Philpott v. Aslett* (c) the insolvent debtor contracted a new debt after his discharge, and gave the plaintiff a bill of exchange for the amount of the old and new debts. Being sued upon the bill the defendant gave a warrant of attorney for the amount; and the court refused to set aside a judgment entered upon such warrant of attorney. In *Sheerman v. Thompson* (d), the defendant being discharged under the 7 G. 4. c. 57. accepted a bill for an old and a new debt. It was held, that the defendant could not, in an action on the bill, plead his discharge as an answer to the whole cause of action. In *Denne v. Knott* (e), a discharged insolvent being arrested for a

3 Co. Rep. 82 b., better reported 2 Anderson, 55., where it is said, "But admitting (*allowant*) that the bond is made for deputation of an office within the statute (5 & 6 Ed. 6. c. 16.), or the exercise thereof, and also to make assurance of the manor of *Dale*, which is not prohibited by any law." In that case the judge held that the bond is wholly void (*void en tout*). And see *Bac. Abr.* tit. *Conditions* (K.) vol. i. 645., 5th and 6th editions.

(a) 5 Dowl. P. C. 13.

(b) 1 Cro. & M. 30.

(c) 1 Cro. M. & R. 85.

(d) 11 A. & E. 1027., 3 P. & D. 656. In that case, *Litledale J.* says, "There might be some difficulty, indeed, if a bond were given as the new

security." And *Coleridge J.* says, "Of course, I confine myself to *divisible* securities, like the present."

(e) 7 M. & W. 143. No notice was taken in this case of the circumstance of the security being by bond. Nor was it necessary to do so; for supposing the bond to be void *in toto*, according to *Lee v. Coleshill, &c.*, the defendant, by suffering judgment in the action, had abandoned that defence. If, however, the statutory illegality of some part of the consideration of a bond furnishes an answer to an action until the defendant has abandoned that defence, there may be some difficulty in distinguishing such a bond from a warrant of attorney so conditioned.

new debt, gave to *A.* his bail a bond for 300*l.*, in which was included a debt of 80*l.* from which he had been discharged. It was held, that the insolvent was not entitled to be discharged out of custody in execution upon a judgment suffered, in an action on the bond, by default.

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Bompas Serjt. in support of the rule. The cases of *Evans v. Williams* and *Smith v. Alexander* are so directly in point as to remove all doubt. *Powell v. Evans*, *Hocken v. Browne*, and *Abbott v. Bruere* have no bearing upon this case, as they were all cases of annuities, with respect to which the language of the statute is different. In *Evans v. Williams* the indemnity of the surety formed the consideration for the new promissory note; yet the court held that the debt from which the defendant had been discharged, and the new liability upon the promissory note, were substantially the same. [*Coltman* J. *Benton* was discharged, but *Palmer* was not. *Tindal* C. J. Is not this a security given for *Palmer's* debt as drawee, and not for the defendant's debt as acceptor?] In *Philpott v. Arlett* the court refused to relieve the defendant against the warrant of attorney, merely because he had an opportunity of setting up the defence as an answer to the action, and had neglected to avail himself of it. According to the doctrine contended for, an insolvent debtor is to be discharged where there is no surety; but where there is a surety, the creditor may obtain a renewal of the debt from the insolvent, the original debtor. It is as much the old debt when it is renewed as when it is not. [*Tindal* C. J. I cannot help thinking the case of *Evans v. Williams* distinguishable from the present. In that case, both the principal and surety were parties to the note; and, therefore, there was no consideration for the new engagement into which the defendant entered.

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 — the surety, and accepted a composition for his debt
 COLLINS at the request of the defendant. Can it be said that this
 v. warrant of attorney is not given upon a *new* consider-
 BENTON. ation?] In cases of composition the surety would be
 discharged from the residue. It was intended by the
 legislature that the creditor should rest satisfied with the
 judgment entered up in the insolvent debtor's court.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court, and after stating the terms of the rule, and the material parts set out in the affidavits, as given above (a), his lordship proceeded thus:—

Upon these facts, it was contended by the defendant that the judgment and execution were illegal, because founded upon a warrant of attorney given to secure a debt from which he had been discharged under the statute 7 G. 4. c. 57.; by the sixtieth and sixty-first sections of which act insolvents entitled to the benefit of that act are protected from all writs of execution for any debt with respect to which they have become so entitled, except writs issued, by leave of the court, upon the judgment entered up against them in pursuance of that act and from all actions or suits upon any new contract or security for the payment of such debt. The cases of *Smith v. Alexander* (b) and *Evans v. Williams* (c) were principally relied on in support of this application.

On the part of the plaintiff, it was argued, that the warrant of attorney was not given to secure any debt from which the defendant had been discharged; for that *Palmer* still continued liable upon the bill as drawer,

(a) *Suprà*, 361.

(b) 5 *Dowl. P. C.* 13., *suprà*,

864.

(c) 1 *Cro. & M.* 30., *suprà*,

862. 864.

and that if the plaintiff had recovered and received the amount from *Palmer*, *Palmer* might have recovered the debt and costs from the defendant notwithstanding his discharge under the act; and, therefore, that the warrant of attorney was given as a security for *Palmer's* debt, and upon a good consideration, and that too, without increasing the defendant's liability. And the case of *Evans v. Williams* was distinguished from the present, on the ground, that, in that case, the surety had not been discharged from his liability; for that he had joined the principal in the new security upon which the insolvent was afterwards sued; whereas, in this case, *Palmer* had been absolutely released from the debt by his discharge from the *Fleet*, and had not joined in any fresh security for the debt. But we are of opinion that this distinction does not affect the principle upon which the decision in *Evans v. Williams* rests, and upon which we think the defendant is entitled to the relief he seeks, as to so much of the debt levied under the judgment in question as represents the original sum of 42*l.* recovered against *Palmer*. It is true that the release of *Palmer's* liability presents, in this case, an additional consideration for the new security, beyond that which is to be found in the case of *Evans v. Williams*; but that case was decided upon the ground, not that the consideration for the new promise was *insufficient*, but that the new security, though given upon a sufficient consideration, was a security for the old debt, and therefore within the prohibition of the statute. And the test applied by *Bayley B.* to the question, whether the debt secured was the old debt or not, is equally applicable to the case before us. That test is, whether an execution taken out under the authority of the insolvent court would affect the payment of the debt covered by the new security. To apply this test in the most favourable way for the plaintiff, let it be supposed that the warrant

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of attorney had been given by some stranger, and that before the plaintiff had taken out execution upon his judgment, the assignee of the insolvent had, under the authority of the court, levied upon the defendant's goods enough to pay 20s. in the pound to all the creditors named in the schedule, and the plaintiff had received his proportion, and had thus been paid, in full, the defendant's original debt of 42*l.*; could he, nevertheless, proceed against the person giving the warrant of attorney to secure *Palmer's* debt? Surely not, because *Palmer's* liability being that of a surety, the security given for that debt would be discharged by payment of the principal. In other words, there never was but one debt of 42*l.* due to the plaintiff, though he had a double security for its payment; and the multiplication of securities could not entitle him to the payment of that sum more than once. But the identity of the debt becomes more strikingly obvious in this case, when we see that the consequence of deciding otherwise might be to entitle the creditor to receive the original debt twice over from the same person. Again, take the case suggested by the plaintiff, and suppose that *Palmer*, when taken in execution, had paid the bill; it is true that he might have recovered the amount of the bill from the defendant, for there is no clause in the Insolvent Act, as in the Bankrupt Act, placing the surety in the position of the original creditor. Still, the claim of the original creditor upon the future assets of the insolvent would be superseded by the payment by the surety; which could only be on the ground that the payment was in respect of the same debt as that included in the schedule.

It is a fallacy, therefore, that lies at the root of the plaintiff's argument, that the defendant, in assuming to himself the liability of *Palmer*, undertook the payment

of a *different* debt from that which he had already inserted in his schedule.

So far, therefore, as the warrant of attorney and judgment stand as securities for the original sum of 42*l.* secured by the bill of exchange, the execution under them must be set aside, and the money returned to the defendant.

But as to the costs of the action against *Palmer*, which formed no part of the original debt from which the defendant was discharged, and of which he has taken the payment upon himself in consideration of *Palmer's* discharge, we see no ground for our interference.

The affidavits do not sufficiently disclose the facts to enable us to decide how much, or if any thing, was due in respect of those costs at the time of the execution. The parties, however, have very properly agreed to have that question settled by the Master; and, therefore, the court will direct that it be referred to the Master to ascertain what sum, if any, was due to the plaintiff at the time of the execution in respect of the costs of opposing the defendant's discharge, and of the costs in the action of *Collins v. Palmer*; and that the sheriff do pay over to the plaintiff such sum, if any, as the Master shall find to be due, and do pay back to the defendant the residue of the said sum of 46*l.*, after deducting his fees and expenses in respect of such sum, as the Master shall so find to be due to the plaintiff.

Rule accordingly.

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May 4.

**DOSSETT v. GINGELL, Administrator of the
Estate and Effects of ALLEN, deceased.***15 Jur 357.*

Held, that the court has no jurisdiction over fees of arbitrators, paid under protest upon taking up the award, but not specified in the award itself; or over a sum paid, under a similar protest, to an attorney for preparing the award; even in a case where the reference is, in a pending cause, under a judge's order made a rule of court.

Semble, that the remedy is by action for money had and received.

THIS cause, and all matters in difference between the parties, were referred, by an order of *Tindal C. J.*, to three arbitrators, each party to pay the charges of the arbitrator appointed by himself, and those of the third to be borne equally between them. An award was made by two of the arbitrators in favour of the plaintiff; which award was prepared by an attorney, to whom the plaintiff, upon taking it up, paid, under protest, 16*l.* 16*s.* for each of the arbitrators who executed the award, and 11*l.* 18*s.* for the costs of preparing it.

Wilde, Solicitor-General, in *Michaelmas* term last, obtained a rule, calling upon the two arbitrators and the attorney to shew cause why they should not repay to the plaintiff so much of the money received by them respectively as the master had disallowed upon the taxation of costs as between the plaintiff and the defendant, and why they should not pay the costs of this application. An affidavit, upon which the rule was granted, stated that after the taxation of the costs between the plaintiff and the defendant, one of the arbitrators who had joined in the award, and the attorney by whom it was prepared, attended before the master upon an appointment made by him for reconsidering his taxation as to the amount of these fees and costs.

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Stephen Serjt. now shewed cause, upon an affidavit stating that the arbitrator and the attorney attended before the master solely for the purpose of explaining what the 45*l.*, the sum charged for the award, was com-

posed of, and that they protested against the right of the master to tax such fees and charges. If an over-payment has been made, the party has his remedy by action for money had and received; and, though the bringing of an action may be attended with inconvenience, there is no authority to interfere in the manner prayed. The court has no jurisdiction to proceed against the arbitrators. [*Bosanquet J.* This is a reference in an *action*.] Admitting that arbitrators appointed in an action pending may be considered, to a certain extent, as officers of the court, the cases in which redress has been given against excessive fees have been upon motions to set aside so much of the award as relates to the fees; but there is not any case where the court has interfered upon motion when the fees formed no part of the award. Still less can the question be gone into by the master, upon the taxation of a bill of costs. [*Erskine J.* Has the money been paid?] It has; and from the time of payment, at least, the arbitrators ceased to be amenable to the court. If the name of an attorney was off the roll, the court would have no jurisdiction to call upon him; *à fortiori*, it has none over a person employed to draw up an award. It is altogether a private employment. Here, each party was to pay his own nominee; yet the plaintiff complains that *Crossley*, the arbitrator named by the defendant, has been over-paid.

If neither the defendant nor his attorney object, why should the plaintiff complain? The course which has been taken is obviously vexatious.

Wilde S. G. in support of the rule. The reference being under a judge's order, which has been made a rule of court, the arbitrators are *quasi* officers of the court, and are amenable to its jurisdiction. The jurisdiction of the court in such cases has been long established. Thus, in

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Miller v. Robe (a) the court referred it to the prothonotary to reduce an excessive sum which the arbitrators had awarded to themselves. So, the court has power to deal with an arbitrator who withholds his award upon a demand of extortionate fees ; *Maccarthur v. Campbell*. (b) So, in *Fitzgerald v. Graves* (c), *Heath J.* says, "It cannot be that it is in the power of an arbitrator to fix the amount of what shall be paid to himself, without any control over it. That would be making him a judge in his own case." [*Erskine J.* Was the arbitrator before the court in that case?] The observation of *Heath J.* was, no doubt, made in a case between the parties in which the arbitrator was not called upon. The necessity for a controlling authority over the power of the arbitrator to fix the amount of his own fees is as cogent where the amount of the fee appears upon the face of the award, or where it does not. In *Musselbrook v. Dunkin* (d), an objection being raised to the arbitrator's charges, a rule was obtained and afterwards made absolute, to tax these charges. In that case *Tindal C. J.* said, "I concur in thinking that the award cannot be said to be ready, when it is only to be had on submitting to a wrongful demand, and in that case the plaintiff moved to set aside the award." [*Stephen Serjt.* The plaintiff should have done that here.] He was not bound to wait for the result of such an application. Parties would be placed in a state of great difficulty if the court had no power to grant the relief prayed. [*Maule J.* It is said that the plaintiff might bring his action.] He would not know what to tender, he might be in a state of ignorance as to the number of meetings which the arbitrators had held. (e)

(a) 3 Taunt. 461.

(b) 5 B. & Ad. 518., 2 N. & M. 444.

(c) 5 Taunt. 342.

(d) 9 Bingham 605., 2 M. & Scott, 740.

(e) This would be a difficulty in an action on the case

[*Maule J.* Suppose arbitrators to act corruptly, could the court proceed against them summarily?] I should not hesitate to make the motion. In Chancery an undisputed power is exercised over auditors (a) appointed by the court. The court will not allow persons to retain that which it would not have allowed them to receive. In *Crawshay v. Collins* (b), the general jurisdiction of the court "to direct the proceedings of persons who have undertaken the office of judge, to which it has appointed them," was asserted by *Gifford* Solicitor-General and not denied, though Lord *Elden C. J.* refused to make an order upon the arbitrators to proceed in the reference. The general jurisdiction of the court was not questioned in *Brazier v. Bryant* (c), where an application resembling the present was refused, merely on the ground that it was made too late.

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Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court. This was a rule calling on two arbitrators, who had joined in making an award, to whom, with a third, this cause had been referred by a judge's order, to refund so much of the amount of the fees paid them for their award as exceeds the sum allowed by the master on taxation between the plaintiff and defendant; and also calling on Mr. *Garrett*, an attorney whom the arbitrators had employed to draw up the award, to refund the excess of the amount paid him for his services beyond what was, in like manner, allowed on taxation.

The rule, it was contended, ought to be made abso-

for wrongfully withholding the award, but not in assumpsit to recover back moneys paid without consideration.

(a) *Quære*, as to the jurisdiction exercised by courts of

common law over auditors appointed in an action of account.

(b) 1 *Swanst.* 40.

(c) 3 *M. & Scott*, 844. *S. C.* not *S. P.*, 3 *Bingh.* 167., 10 *B. Moore*, 587.

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lute on two grounds — first, that the court has a general jurisdiction over the amount of fees paid in cases of arbitration under a rule of court; secondly, that in this particular case, the arbitrators and the attorney had submitted themselves to such jurisdiction; as to which latter ground, though it appears that one of the arbitrators and the attorney, after the original taxation of costs between the parties, attended an appointment which the master had made, to reconsider his taxation as to the amount of fees, we think that there is nothing to shew that, by so doing, they intended to give any power to the court, or to submit themselves to any liability that did not before exist.

The question, therefore, turns upon the first ground; as to which several cases have indeed been cited in which, *as between the parties to a rule of reference*, the amount of fees paid to an arbitrator has been ordered to be taxed. But no instance has been found in which any order, such as that now sought to be obtained, has been made *against an arbitrator*. The effect of a rule of reference is, not to put the arbitrators in a different situation from that in which they would be placed under a submission without such a rule, but to give cheaper and more convenient remedies between the parties. Where a submission is made under the statute of 9 & 10 W. 3. c. 15., that statute provides, that the parties may insert in their agreement that their submission be made a rule of court; and thereupon the court shall make a rule (a) that the parties shall submit to, and be concluded by the arbitration. And the second section, which limits the time for an application to set aside the award, is silent with respect to any application against the arbitrators. The present case is indeed not that of a submission under the statute; but that act has always been considered as throwing light upon, and affording

(a) *Vide antè*, 850. (c).

analogies to determine, the law in cases of submission to reference by a rule made in a cause. And though it must have been matter of frequent occurrence that parties have been dissatisfied with the conduct of arbitrators with respect to their fees and in other respects, we find no instance of the courts' having entertained a motion against an arbitrator.

On the whole, therefore, we think that we should not be warranted, by any principle of law, or by the practice which has prevailed, in making this rule absolute against the arbitrators. And as Mr. *Garrett* the attorney has not, any more than the arbitrators, conferred on the court any special jurisdiction, and there is no ground for contending that, independently of his consent, his charge is the subject of taxation, we think this rule must be discharged as against him also. The rule having been moved with costs, it must be discharged with costs.

Rule accordingly.

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FIVE horses, seized by the sheriff of *Buckinghamshire* under a *fi. fa.* in this action, having been claimed by *A. M. Thompson*, an application was made, at chambers, on the part of the sheriff, under the interpleader act; and *Coltman J.* made an order directing a feigned issue, in which *Thompson* was to be plaintiff,

An issue was directed under the interpleader act, between *A.* the claimant, and *B.* the execution creditor, to try

whether five horses, or one or some of them, were or was, when taken in execution, the property of *A.* The jury found that two horses only belonged to *A.* *A.* obtained a rule nisi for payment to him of the general costs of the issue, the costs of the application under the interpleader act, and the costs of the rule. The court gave neither party the general costs of the issue nor the costs of the rule, but gave to each such portion of the costs as applied to the part on which he had succeeded, and allowed *A.* his costs of the application under the interpleader act.

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and *Lewis* defendant, in which *Thompson* alleged, that each and every of the five horses belonged to him, but the issue was taken “whether the said five horses, or one or some of them, were or was, at the time of the seizure, the property of *Thompson*, the plaintiff.” The order further directed that the horses should be sold, and the money brought into court.

Upon the trial of the issue before *Tindal* C. J., at *Guildhall*, a verdict was returned, affirming *Thompson*’s property in two of the horses (sold under the judge’s order for 26*l.* 10*s.*), but negating his property in the other three (sold for 46*l.* 14*s.*).

Halcombe Serjt., in the early part of this term, on behalf of *Thompson*, moved for, and obtained, a rule, calling upon *Lewis* to shew cause why he should not pay to *Thompson* the costs of the issue and of the application to *Coltman* J., and of the rule then moved for, upon the authority of *Staley v. Bedwell*. (a) He referred also to *Bowen v. Bramidge* (b), *Bland v. Delano* (c), *Barnes v. The Bank of England* (d), *Meredith v. Rogers*. (e) [*Erskine* J. called the attention of the learned serjeant to *Carr v. Edwards*. (g)]

Talfourd Serjt., on a subsequent day, shewed cause. The question here is, whether the claimant *Thompson* is to have the whole costs as demanded by this rule, or whether he shall have a part of the costs in proportion to the property recovered, or whether each party shall pay his own costs. This is a question purely and entirely for the discretion of the court. There does not seem to be any analogy between this proceeding and an

(a) 10 *A. & E.* 145. ; 2 *P. & D.* 309.

(b) 2 *Dowl. P. C.* 213.

(c) 6 *Dowl. P. C.* 293.

(d) 7 *Dowl. P. C.* 319.

(e) *Ibid.* 596.

(g) 8 *Dowl. P. C.* 29.; *Kerr v. Edwards*, 8 *Scott*, 337.

action of trover. Without entering into the merits it may be observed, that the property seized was of a description which the judgment creditor was entitled to seize. *Staley v. Bedwell* will be relied on by the other side. In that case, though the court of Queen's Bench gave the plaintiff all the costs, no general rule was laid down; and *Coleridge J.* expressly says, "I concur, on the particular circumstances of the case." (a) The circumstances were indeed very particular; the claimant being sole owner of part of the property, and part owner, with the execution debtor, of the residue. In *Carr v. Edwards* the plaintiff, in a feigned issue under the interpleader act claiming 182*l.*, had a verdict for 50*l.* An order was made at chambers, by which each party was to pay his own costs. The plaintiff in the issue moved to set aside that order, contending that he was entitled to the general costs of the cause. *Maule J.* says, "it is found in this case that the plaintiff is only entitled to a sum less than the third part of the amount claimed, and that the defendant is entitled to a great deal more; and it seems to me that the order is both reasonable and just. Had it been what it is contended it should have been, I think it would have been neither the one nor the other." The same doctrine has been held in the Exchequer in several cases not reported. In one of those cases, *Soames v. Ambridge*, the facts appear to have been these: *Ambridge*, the defendant, had lived at *Finchley*, in *Middlesex*, with a person who passed for his wife. From *Finchley* the parties removed to *Kennington* in *Surrey*. A *fi. fa.* having issued into *Surrey* upon a judgment against *Ambridge*, the sheriff seized goods in a house in which the defendant and this woman resided. The woman, who had dropped the name of *Ambridge*, and

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(a) 10 A. & E. 148.

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taken, or returned to, that of *Davies*, claimed the goods seized by the sheriff under the execution. An issue was directed to be tried between *Elizabeth Davies*, the claimant and *Soames*, the execution creditor. After notice of trial given *Elizabeth Davies* intimated that she withdrew her claim as to a portion of the goods; but this intimation came too late to affect the proceedings at the trial of the issue; and the case went to the jury as to all the goods seized. The claim was substantiated as to all the goods except those the claim to which had been so abandoned; and a verdict was returned accordingly. Upon an application being made to the court for the costs of the issue, it was contended on the part of the claimant, that the feigned issue must be considered in the light of an action of trover, brought by her against a sheriff defending the action under an indemnity from the execution creditor; but the discussion terminated by the pronouncing of the following rule.

“In the Exchequer of Pleas. *Michaelmas* term, 3 *Vict.* 1839, *Soames v. Ambridge*. *Saturday, 23d November*. Upon reading the rule in this cause, of the 11th day of *November* instant, the affidavit of *Amos Kempson* and the paper writing thereunto annexed, and the affidavit of *George Brown* and the paper writing thereunto annexed, and hearing Mr. *Platt*, of counsel for the plaintiff, and Mr. *Humfrey*, of counsel for *Elizabeth Davies*, the claimant in the rule named: It is ordered, that the costs be taxed as upon two issues, the plaintiff to be allowed his costs of supporting the issue, as far as regards the goods in respect of which he succeeded at the trial, and the said *Elizabeth Davies* to be allowed the costs of shewing her title to the goods in respect of which she succeeded at the trial. The costs of the interpleader rule, and the general costs of the issue, to be taxed and divided between, and borne by, the parties, in the same proportion as the costs, so as aforesaid, to

be allowed to the plaintiff and claimant respectively, bear to each other; each party to bear and pay his and her own costs, of this application, and subsequent thereto. By the Court."

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The course taken by the court of Exchequer in that case, is much more reasonable and just than it would be to call upon the party who has succeeded to the greater amount to pay the costs of the party who has succeeded to a less amount. The execution creditor is, however, content that each party shall bear his own costs; in consenting to which he is giving up more than he is bound to do. This was the course adopted in *Carr v. Edwards* by *Coltman J.*, whose order the court refused to disturb.

The court gave *Halcombe Serjt.* time to consider whether he would agree to the proposal, that each party should bear his own costs; and *Tindal C. J.* suggested, that if this proposal were rejected, the claimant might have to pay more than he would be entitled to receive; and stated that the court thought that the direction as to the costs in *Carr v. Edwards*, was just and reasonable.

Halcombe Serjt., not having accepted the terms offered by the other side, now shewed cause. The court cannot adopt either of the courses suggested on behalf of the execution creditor, without overruling *Staley v. Bedwell*. In that case a feigned issue was directed to try three questions, in the form of three issues, 1st, whether the goods, or any part thereof, were or was, the sole property of the claimant; 2dly, whether they, or any part thereof, were or was, the sole property of *F. Bedwell* the execution debtor; 3dly, whether they, or any part thereof, were or was, the joint property of the claimant and *F. Bedwell* as partners; and the jury

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were to be directed to find specially the value of any part of the goods which should be proved to be the sole property of the claimant, or the sole property of *F. Bedwell*, or the joint property of both, in case they should be of opinion that the whole were not the sole property of either or the joint property of both. On its appearing at the trial that part of the goods were the sole property of the claimant, and the residue, the joint property of the claimant and *F. Bedwell*, the verdict was entered on the first and third issue, partly for the claimant, and partly for the execution creditor; and, on the second issue, for the claimant. In that case—as in this—the litigation arose entirely out of the wrongful act of the execution creditor in causing the property of the claimant to be seized; and the court held that the claimant was entitled to the general costs of the issue, as well as to those of the preliminary and final application to the court, to the same extent as if he had been plaintiff in an action of trover, and established his title to part only of the goods mentioned in the declaration. Lord Denman C. J. says (a), “It is as if the claimant had succeeded in an action of trover,” and *Littledale* J. says (b), “If the claimant had succeeded in trover, he would have been entitled to the general costs. The only consequence of claiming too much in such a case would have been, that the execution creditor might have applied to pay money into court; in which case the claimant would have gone on at his peril. The claimant, therefore, is to have his general costs of the issue and of the application.” The rule was made absolute for payment of the several sums of 34*l.* 9*s.* 6*d.* (c), 12*l.* 3*s.* 6*d.* (d), and

(a) 2 *P. & D.* 314.(b) *Ib.*(c) Being 26*l.* 8*s.*, the value of the sole property after de-ducting half the rent payable to the landlord; to which sum was added a moiety of the joint property—together, 39*l.* 7*s.* 6*d.*,

5*l.* 14*s.* (a) to the claimant, the plaintiff, and the sheriff, respectively, with a reference to the master, to tax to the claimant the general costs of the cause (deducting those of the judgment creditor upon the issues on which he has succeeded), and also the costs of appearing in the first instance and on the final application. *Carr v. Edwards* was decided, on the ground that the court would not interfere with the decision of the judge at chambers. The Lord Chief Justice says (b) “I think we ought not to disturb the order made by Mr. Justice *Coltman*, unless we can see, that in the execution of *the discretion*, clearly given to him by the statute, he has arrived at a wrong conclusion. But I confess that I do not see, under the circumstances of the case, that he has done so.” [Tindal C. J. That case was so decided, because the court approved of the grounds upon which the learned judge had proceeded in making his order.] When *Carr v. Edwards* was decided, the case of *Staley v. Bedwell* had not been reported, and was not brought before the court. *Carr v. Edwards* was a simple case of conflicting claims, under the *first* section of the interpleading act, not a sheriff’s case of adverse claims, arising out of an execution, under the *sixth* section. There had been no seizure of the goods by the defendant in the issue; and, no wrong having been done, no action of trover would have lain. Here, it is not denied that the defendant in the issue, the execution creditor, was a wrong-doer, having seized two horses belonging to the claimant. In *Soames v. Ambridge*, the claimant had lived with the execution debtor, as his wife, at *Finchley*, from whence they removed to a cottage at *Kennington*,

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 out of which the claimant, by the terms of the interpleading order, was to pay the defendant, the sheriff, the sum of 3*l.* 18*s.* possession money.

(d) A moiety of the value of the joint goods.

(a) Possession money and poundage.

(b) 8 Dowl. P. C. 31.

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where the claimant assumed the name of *Davies*. The ground of the decision in that case was, that the claimant had set up a claim to goods which she *knew* to be the property of the judgment debtor; as might be inferred from her giving notice that she abandoned her claim to these goods. [*Erskine J.* The 1 & 2 *Vict. c. 45. s. 2.*, has given to a single judge the same discretion as to costs in cases of conflicting claims upon executions, falling within the *sixth* section of 1 & 2 *W. 4. c. 58.*, as that statute gave in cases falling within the *first* section.]

TINDAL C. J. The costs which form the subject of this motion, may be divided into — costs incurred before the present issue was granted, costs of the trial of issue, and costs of the subsequent applications. I will first consider the costs of the trial of the issue, being the most important, and those upon which the principal contention has arisen. *Thompson* set up a claim to five horses, seized by the sheriff under an execution against the defendant in this action. The execution creditor denied that *Thompson* was entitled to any of these horses; and upon the trial of the issue, the claimant established his right as to two of the horses, and failed as to the other three; which shewed that *Thompson* had claimed for too much, and that the execution creditor had defended for too much, and ought to have given up three of the horses when *Thompson* gave notice of his claim. On each side too much has been claimed; and it therefore appears to me that neither party is entitled to the whole of the costs of the issue. I cannot consider this case as in the nature of an action of trover, in which, by the strict rule of law, founded upon the statute of *Gloucester (a)*, the plaintiff is entitled, as of right, to the costs of the cause, if he succeeds as to any part of it. I cannot

(a) 6 *Ed. 1. c. 1.*; and see 2 *Inst. 288.*

think that costs under the interpleader act (a) were meant to be subjected to so rigorous a rule. The first section of that act authorises the court, or any judge thereof, to make such rules and orders as to costs, and all other matters as may appear to be just and reasonable, giving to the court a more extended jurisdiction than they possessed under the statute of *Gloucester*, or any subsequent statute. So, in cases under the sixth section, upon claims made to goods taken or intended to be taken in execution, the court is authorised to make such entry and decision as shall appear to be just, according to the circumstances of the case; and the costs of all such proceedings are to be in the discretion of the court. (b) It seems to me that we are entrusted with a discretion as to costs, in the exercise of which we ought to be mainly guided by the decision of the jury; and I think that a reasonable and equitable course will be, upon the finding of the jury in this case, to direct that the master should look at the bills of costs on both sides, and see how much was incurred by the claimant in making out his claim as to the two horses, and how much by the execution creditor in making out his defence as to the three horses, and that he should balance one set of costs against the other, and that, for this purpose, he should look at the briefs, and ascertain how much of the briefs and witnesses, and other expenses, relate to the two horses, and how much to the three. That seems to be the just and proper course to be adopted with respect to the costs of the issue. (c)

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(a) 1 & 2 W. 4. c. 58.

(b) The 1 & 2. Vict. c. 45. s. 2 makes no alteration in the authority, except to extend it to a single judge.

(c) So, at common law, if the plaintiff succeeded for part, and failed to establish his right of action for the residue, the

plaintiff was amerced for his false claim as to the part in respect of which he failed, and the defendant was amerced or fined, according to the nature of the action, in respect of the part upon which the plaintiff succeeded.

If the costs in this case had

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With respect to the costs of the interpleading application incurred prior to the direction of this issue, as the claimant was placed under the necessity of making that application, by the act of the execution creditor, in seizing more than he was entitled to seize, and as at the period when those costs were incurred, no injury had accrued to the execution creditor from the circumstance that five horses were claimed instead of two, I think that the costs of such application ought to be borne by the execution creditor.

As to the costs subsequent to the trial of the issue, though the claimant was obliged to come before the court, yet as he has claimed, by his rule nisi, more than he is entitled to, and has therefore compelled the execution creditor to appear for the purpose of resisting that claim, I think that no costs ought to be allowed on either side.

BOSANQUET J. This is a case in which neither party is *entitled* by law to costs. The statute leaves them to be dealt with as the court shall think just and reasonable. In this case it turns out upon investigation, that each party is partly in the right and partly in the wrong. In such a case, I think the rule which has been pronounced by my Lord Chief Justice is just and reasonable.

been taxed with reference to the practice which has prevailed under the statute of *Gloucester*, it would have been necessary to look to the *form* of the issue tried. If the plea had traversed the assertion that "the five horses and *each and every of them* were and was the property of the claimant at the time of the seizure," the wager must have been decided, and the issue found generally, against him, upon proof that any one horse was not at that time his

property; but the issue being upon the question whether the five horses *or one or some of them* were or was the property of the claimant, proof that *one* horse belonged to him would have decided the wager and the issue in his favour. The form of the issue, however, appears to be of as little consequence, with reference to the discretionary power of the court, as the supposed analogy of the proceeding to the action of trover against the sheriff.

COLTMAN J. concurred.

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ERSKINE J. I am of the same opinion. It is of great importance that in the exercise of the discretion with which we are entrusted under these statutes, we should proceed not arbitrarily, but by some fixed rule; and that laid down by my Lord is, I think, the best which could be adopted.

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Halcombe Serjt. then applied for the costs of taking the 26*l.* 10*s.* out of court.

TINDAL C. J. Those costs you are entitled to.

The following rule was ultimately drawn up.

“It is ordered, that no general costs of the issue directed by the Honourable Mr. Justice *Coltman* on the 20th of *January* 1840, in which *Thompson* was plaintiff, and the above-named *Lewis* was defendant, or of this application to the court, be payable by either of the parties to the said issue to the other; but that the said *Lewis* do and shall pay to the said *Thompson* or his attorney, his costs of, and occasioned by, his application to a judge under the interpleader act, together with his costs of, and occasioned by, his application to have a portion of the money in the hands of the masters of this court in the cause paid out of court to him, such costs to be taxed by one of the masters of this court; and it is further ordered that it be referred to such master to ascertain and tax such of the said *Thompson*’s costs at the trial of the issue, as apply to the two horses found by the said jury to be the property of the said *Thompson*; and that such costs, when so taxed and ascertained as aforesaid, be paid by the said *Lewis* to the said *Thompson*, or his attorney; and that it be, in like manner, referred to the said master, to ascertain and tax such of the said *Lewis*’s costs as relate to the three horses,

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 ——— *Lewis* at the said trial (a); and that such costs, when so
 LEWIS ascertained and taxed as aforesaid, be paid, by the said
 v. *Thompson* to the said *Lewis* or his agent; and lastly, it
 HOLDING. is ordered, that the said master be at liberty to deduct
 one set of the said costs from the other, and to make
 one allocatur for the balance.”

(a) They were so in effect.

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NEWTON v. HARLAND and Another.

On the taxation of an attorney's bill as between attorney and client, more than one sixth of the amount was struck off in consequence of all charges being disallowed previous to the 15th of July 1837, when the 7 W. 4. & 1 Vict. c. 56. came into operation, by reason of the attorney not having been an attorney of this court.

THE plaintiff, in person, had, on a former day in this term, obtained a rule calling on his attorney to shew cause why the latter should not pay him the costs of taxing his bill in this cause, and also why the proceedings should not be stayed in an action pending in the court of Exchequer upon certain terms, and why the attorney should not pay the costs of the application.

It appeared from the plaintiff's affidavit, that he had retained the attorney to conduct an action of trespass against the defendants, and that after the cause had proceeded to issue, it was discovered that the attorney, although an attorney of the court of Queen's Bench, had never been admitted an attorney of this court. The bill of costs delivered by him to the plaintiff, included charges for business done both before and since the 15th of July 1837, the day on which the statute of 7 W. 4. & 1 Vict. c. 56. came into operation. (a) The

Held, that the attorney was liable to pay the costs of taxation, under the 2 G. 2. c. 23. s. 23.

(a) See *Newton v. Spencer*, 4 New Cases, 174., 5 Scott, 489.

master, on the taxation of the bill, struck out all charges anterior to that day, whereby the amount of the bill was reduced more than one sixth.

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Andrews Serjt. now shewed cause. This case falls within the principle of *White v. Milner* (a), in which it was held that an attorney is not liable to pay the costs of taxing his bill under the 2 G. 2. c. 23. s. 23., where the deduction of one sixth is occasioned, not by the reduction of particular items, but by the disallowance of one branch of the bill. Upon the second part of the rule, it is submitted that the court has no jurisdiction over the action in the Exchequer.

Newton, in support of the rule, cited *Morris v. Parkinson* (b), and contended, that as the attorney had inserted charges exceeding one sixth of the whole bill, which he must have known he had no right to make, he was not only liable to the costs of taxation, but ought to be compelled to pay the costs of the present rule.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court. In this case Mr. *Newton*, the plaintiff, carried his attorney's bill before the officer of the court for taxation as between attorney and client, and upon such taxation, it appeared that during a considerable portion of the time during which he was retained, the attorney was not an attorney of this court, though he was an attorney of the Queen's Bench. It was thereupon insisted before the master, that the attorney was not entitled to recover in respect of fees, charges, or disbursements incurred prior to the 15th of *July* 1837, when the sta-

(a) 2 H. Blac. 357.

(b) 5 Tyrwh. 772., 2 C. M.
 & R. 178.

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tute 7 *W. 4. & 1 Vict. c. 56.* which enabled attorneys admitted in one of the courts of law at *Westminster* to practise in any other of the courts, though they might not have been admitted attorneys thereof, came into operation, and the master, yielding to the objection, struck out that portion of the bill. We think the view taken by the master was correct, and that those charges were properly struck out. The case now comes before us upon a motion to award the costs of taxation to be paid by the attorney, inasmuch as more than a sixth part of the whole bill was taxed off. The court took time to consider whether or not this case could properly be held to fall within the principle of those where the reduction of the bill, not being the result of a taxation or scrutiny of the particular items of charge, but occasioned by the disallowance of whole classes, the party has been held not chargeable to the expense of the taxation. The first of these cases was *White v. Milner*. (a) There the attorney's bill had been referred to the prothonotary by a judge's order, and on taxation more than a sixth was taken off; but the deduction was caused, not from any overcharges of particular items, but from the whole of the expenses of defending two actions for one *Brandon* being disallowed, the prothonotary thinking there had been no undertaking on the part of the defendant to pay those costs, as alleged by the plaintiff; and the court held that the statute 2 *G. 2. c. 23. s. 23.* was applicable only where an attorney make exorbitant charges on his client in the particulars of his bill, and the foundation of the demand was not denied, but only the amount of it. A later case, however, *Morris v. Parkinson* (b), shews that that principle, at all events, is not to be extended. It was there held, that when the

(a) 2 *H. Blac.* 357.

(b) 2 *C. M. & R.* 178., 3
Dowl. P. C. 744.

master on taxation decided that one of the actions in which the costs had been incurred, had been improperly brought, and disallowed those costs, by which more than one sixth of the bill was taken off, the attorney was chargeable with the costs of taxation. And *Parke B.* said, "It is not necessary to say whether the decision in the case of *White v. Milner* is right or wrong, because this is distinguishable from that case: there the sum was struck out because the defendant was not chargeable with it, and it ought to have been charged to another person. In the present case, the sum in question was disallowed, because the attorney ought not to have charged this item at all, and, therefore, it ought never to have been inserted in the bill." Upon consideration, we think this case falls within the principle of *Morris v. Parkinson*, a principle we do not think it safe to break in upon. I therefore think, and the rest of the court agree with me, that the rule should be made absolute so far as regards the costs of the taxation; though it is not without regret that we throw these costs upon the attorney. The costs of the rule, however, are in the discretion of the court; and as the rule embodies in it terms that we cannot enforce, we think the costs of this application should not be included.

Rule absolute accordingly.

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May 7.

CARISS v. TATTERSALL.

Int 404.

In an action by the payee against the maker of a promissory note, the note, on being produced, appeared to have been altered; the words "or order" having been substituted for "or other." The attesting witness who had prepared the note stated that he could not say whether the alteration was in his writing or not, but that he ought to have drawn the note originally with the words "or order." The defendant had paid two years' interest on the note.

Held, that

this was rea-

sonable evi-

dence from which it might be inferred that the alteration had taken place with the defendant's consent.

ASSUMPSIT, on a promissory note for 20*l.* by the payee against the maker. The plea denied the making of the note; on which issue was joined.

At the trial before *Coltman J.*, at the last *Yorkshire* summer assizes, the note on being produced in evidence appeared to have been altered, the words "or order" having been substituted for the words "or other," which were originally written. The attesting witness to the note, by whom it had been prepared, stated that he could not say whether the alteration was in his writing or not; but that he ought to have drawn the note originally with the words "or order." The defendant had paid two years' interest upon the note.

It was contended for the defendant, that the *onus* lay on the plaintiff to shew that the alteration was made before the signing of the note; *Knight v. Clements.* (a) The learned judge directed a verdict to be taken for the plaintiff for 23*l.* 10*s.*, giving the defendant leave to move to enter a nonsuit, if the court should think that the objection could be sustained.

Channell Serjt. accordingly, in last *Michaelmas* term, obtained a rule nisi for a nonsuit, against which

Talfourd Serjt. now shewed cause. The question is, whether this is not a mere correction, in order to make the note correspond with the original intention of the

(a) 8 *A. & E.* 215., 3 *N. & P.* 375. *post*, 892. 910.

parties. [*Tindal* C.J. The general rule is, that some explanation should be given by the parties seeking to enforce the document.] Were it not for *Knight v. Clements*, it might be doubted whether the *onus* is cast on such parties to account for the alteration. With regard to deeds, it is now held that it does not lie on the person producing the instrument, to shew that the alteration had been made before it was signed, but that it is for the party who seeks to impugn the deed, to prove that it was altered afterwards. [*Tindal* C.J. Is the alteration at all material in an action between the original parties?] It is submitted that it is not; or rather, that there has been no alteration in the note at all, in the proper meaning of the word. It is just the same as if some one had written an idle word upon the instrument, for the jury could see that it had been a perfect document; and it is not because some one has secretly altered an immaterial word, that the note is to be invalidated. In *Cole v. Parkin* (a), where, in the sale of a ship, the parties, by mistake, misrecited the certificate of register in the bill of sale, by stating *Guernsey* as the port where the certificate was granted, instead of *Weymouth*; which mistake was rectified when discovered by consent of all parties, and the deed re-executed; it was held that no new stamp was necessary upon such re-execution. So here, if it is to be presumed that the alteration was made by the parties to the note, the fair conclusion is, that it was done to carry out their original intention. It may be inferred from the payment of the interest, that the alteration took place with the consent of the defendant.

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Channell Serjt. in support of the rule. It is said that the alteration is immaterial, inasmuch as the action

(a) 12 *East*, 471.

1841 . is between the original parties to the note. That, it
 — is submitted, is not the proper test to apply. The
 CARES alteration might have seriously affected the situation of
 v. the original parties; for by the note being made nego-
 TATTERSALL. tiable, the maker might have lost his right to set-off,
 which he would otherwise have had. In *Knill v. Williams (a)*, *Le Blanc J.*, referring to *Kershaw v. Cox (b)*, thought the insertion of the words “or order” in the bill of exchange in that case a “very material” alteration. [*Bosanquet J.* Supposing this note to contain, as it originally did, the words “or other,” would it not be payable to the *bearer*? (c) The question is, whether the alteration does not change the character of the note.] In *Kershaw v. Cox* the question arose under the stamp act; and there the alteration in the bill was made with the consent of all parties. Here, if the alteration had been in the handwriting of the attesting witness, it might then have been thought that the correction was in pursuance of the original intention of the parties, and with their concurrence. Deeds stand upon a peculiar ground, depending on a technical rule, which does not apply to bills of exchange and notes. In *Knight v. Clements* all the previous decisions were considered; and it was there held, that where a bill of exchange produced on trial appears to have been altered, the jury cannot, on inspection of the bill, without other proof, decide whether it was altered at the time of the making, or at a subsequent period.

TINDAL C. J. I do not intend to break in upon the rule, that it lies upon the party seeking to enforce a bill or note to account for any alteration that appears

(a) 10 *East*, 432. 437. And see *Bathe v. Taylor*, 15 *East*, 412.

(b) 3 *Esp. N. P. C.* 246.

(c) *Quære*, whether such a note would not be altogether void, see *Blanckenhagen v. Blundell*, 2 *B. & Ald.* 417.

upon the face of the instrument. But, in this case it seems to me, that there was reasonable evidence given from which the jury might infer that this alteration was made with the consent of the defendant, and in accordance with the original intention of the parties. I think, therefore, that this rule must be discharged.

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The rest of the court concurred. (a)

Rule discharged.

(a) See *Clifford v. Dame Fanny Hyde Parker*, post, 909.

ATTWOOD v. Sir MATTHEW WHITE RIDLEY,
Bart., and Others.

May 7.

CASE, for maliciously causing an affidavit to be filed in the court of Bankruptcy, with the view of issuing a fiat against the plaintiff. The defendants, among other pleas, pleaded a justification. The venue being laid in *London*, a summons to change it to *Newcastle-upon-Tyne* was heard before *Bosanquet J.*, on the 9th of *February* last, when the alteration was opposed by the plaintiff, on the ground that, owing to the great influence possessed by the defendants, by reason of their connection with banking establishments in that neighbourhood, a fair and impartial trial could not be had in *Newcastle*, or in the counties of *North-umberland* or *Durham*. The learned judge dismissed the summons, but without prejudice to any application to change the venue to any other northern county.

In an action against bankers at *Newcastle-upon-Tyne*, a rule to change the venue from *London* to *Cumberland* or *Northumberland* was made absolute,—with certain conditions as to the defraying, by the defendant, of the additional expenses of the plaintiff's witnesses,—

on the ground of the great inconvenience which would be occasioned by the defendants having to carry their banking books and clerks to *London*.

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Bompas Serjt., on a former day in this term, obtained a rule nisi to change the venue to *Cumberland*, upon an affidavit of the defendants' attorney, which stated, among other things, that the plaintiff resided in the immediate neighbourhood of *Newcastle*, where the defendants carried on business as bankers; that the cause of action, if any, (with the exception of the mere act of filing the affidavit in the court of Bankruptcy, which the defendants were willing to admit,) and the whole of the matters intended to be relied on by the defendants, as their defence to the action, arose in *Newcastle*, or in the parts of the counties of *Durham* and *Northumberland* immediately adjoining thereto, and not in the city of *London*; that all the defendants' witnesses, and, it was believed, those of the plaintiff also, resided in or near *Newcastle*; that the defendants' witnesses amounted to about twenty, consisting of a barrister and two or more attorneys, practising in *Newcastle*, one or more bankers carrying on business there, and several clerks in a banking establishment there; *that it would be material and necessary for the defendants to produce and prove, at the trial of the cause, the several books of account kept by them in their said banking business at Newcastle, the carrying of which to London would occasion very great inconvenience as well to the defendants as to the parties having transactions with them*; that neither of the late firms of Sir *M. W. Ridley, Bart., Bigge, and Co.*, and *Jonathan Backhouse and Co.*, ever had, nor had the *Northumberland and Durham District Joint Stock Banking Company*, any branch bank or agency in *Cumberland*; that there were not, to the best of the deponent's knowledge and belief, more than eight persons residing in *Cumberland* who were shareholders in, or more than three persons residing there who kept accounts with, the said banking company; that it was the intention of the defendants, in the event of the

venue being changed from *London* to *Cumberland*, to move for a special jury; and that to the best of the deponent's belief, none of the shareholders in the *Northumberland* and *Durham* District Joint Stock Banking Company were returned upon the list of special jurors for *Cumberland*.

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Channell Serjt. now shewed cause, upon an affidavit made by the plaintiff, which stated, amongst other things, that the defendants, for a number of years prior to 1839, carried on at *Newcastle* under the firm of Sir *M. W. Ridley* Bart. *Bigge* and Co., the most extensive and influential banking establishment in the north of *England*, having branch banks or agencies at all the principal towns in the counties of *Durham* and *Northumberland*; and that in 1839, that firm joined the *Northumberland* and *Durham* District Joint Stock Banking Company, which had previously carried on a very extensive business, as bankers, at *Newcastle*, and at most of the principal towns in *Northumberland* and *Durham*; and which joint stock banking company had recently before been founded upon an important branch at *Newcastle*, of a most extensive banking establishment, for many years carried on by *J. Backhouse* and Co.; so that by the means aforesaid, the said *Northumberland* and *Durham* District Joint Stock Banking Company, as then constituted, united the oldest and most extensive banking establishments in the north of *England*, besides an immense influx of banking business and influence arising from shareholders in the said joint stock banking company; that all the defendants, except one, were deeply interested, as shareholders, in the said banking company, two of them being managing directors thereof; that the shareholders amounted to nearly five hundred, comprising a great number of the principal gentry, landowners, merchants, and tradesmen

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of the said two counties of *Northumberland* and *Durham*; that there were between two and three thousand persons keeping accounts with the said joint stock banking company, being of such a condition of life as to comprise a very large proportion of the persons forming the special and common jury lists of the said two counties, and of the said borough and county, and were greatly under the influence of the company, and particularly of the managing directors thereof; that three of the defendants were magistrates of *Northumberland* and *Durham*, one of them having for many years been chairman of the quarter sessions for the former county; another being high sheriff of the same county for the present year, and that they were all extensively connected with the land proprietors of *Cumberland*; that by reason of the premises not only could not the plaintiff expect to have a jury summoned in the said counties of *Northumberland* and *Durham*, which would not as to some of its members be influenced by the means aforesaid, but that the influence of the said banking company extended to the neighbouring counties of *Cumberland*, *Westmoreland*, and *York*, by reason whereof a similar objection to the probability of the deponents having a fair and impartial trial therein existed with regard to all of them; that the questions at issue between the parties were of a commercial character, such as a jury selected from any other than commercial classes was by no means well adapted to the consideration of; that the special juries in *Cumberland* were drawn from the list of magistrates and country gentlemen, and the talesmen were, generally speaking, farmers; that the cause of action did not, with the exception suggested, arise in *Newcastle*, or in the ports of the counties of *Durham* and *Northumberland* immediately adjoining thereto; but that several matters and proceedings, some of which were

alleged and referred to in the declaration, and which, as the deponent was advised and believed, either constituted a part of the cause of action as set forth therein, or, at all events, were therein laid as and special damages resulting to the plaintiff from the conduct of the defendants as therein complained of, and which, in the judgment and belief of the deponent, were very material towards sustaining the action, and increasing the amount of damages which he was entitled to recover in the said action, arose and took place in or within ten miles of *London*, and in other parts of *England*, not in or near *Newcastle-upon-Tyne*, or the counties of *Durham*, *Northumberland*, or *Cumberland*; and that several of the plaintiff's necessary witnesses (to the number of ten at the least), merchants, brokers, and solicitors, residing in *London*, and others (to the number of eight), merchants and brokers at *Liverpool*, *Manchester*, and *Birmingham*.

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The learned Serjeant contended that, if the court were guided in their decision by the balance of inconvenience and expense to which one of the parties must be subjected, the rule ought to be discharged. He cited *Thornhill v. Oastler (a)*, where it was said by *Tindal C. J.* "The plaintiff's right in a transitory action to lay the venue where he pleases, is undoubted; and before we deprive him of it we must be clearly satisfied that justice cannot be done between the parties. Unless we do so, the preponderance of inconvenience must be very great indeed."

Wilde, Solicitor-General, in support of the rule, submitted that the defendants had laid strong grounds before the court for granting the application, which had not been answered by any thing contained in the affidavit made by the plaintiff.

(a) 7 *Scott*, 273.

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TINDAL C. J. That which weighs the most with me is, the inconvenience to these bankers of having to bring up their books and clerks to *London*, thereby causing a serious interruption to their business. I cannot see any reason why the cause may not be fairly tried in *Cumberland*. At the same time, I think it only right, if the plaintiff is put to any great extra expense by bringing witnesses from *Birmingham* and *Manchester*, that such expense should be borne by the defendants.

The rest of the court concurred.

Channell Serjt. electing to try the cause in *Northumberland* —

Rule absolute to change the venue to *Northumberland*, the defendants undertaking to pay the plaintiff or his attorney, in any event of the cause, any extra expense, as well of witnesses as otherwise, to which the plaintiff may be subjected by the change of the venue.

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COCKBURN and Another v. NEWTON.

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ASSUMPSIT, for goods sold and delivered, money lent, money paid, and on an account stated. Pleas, non assumpsit, payment, and a set-off; issue was joined upon the first plea, and was taken and joined upon the other two.

By a judge's order, dated the 13th of *December* 1839, all matters in difference in the above cause at the time of the order, were referred to arbitration, the arbitrator to be at liberty of the several issues raised, without directing the entry of any formal judgment thereon, *the costs of the cause*, including the costs of application for a special jury, and consequent thereon, *to abide the event of the award*, and the costs of the reference and award, to be in the discretion of the arbitrator.

All matters between the parties in a certain cause were, under a judge's order, referred to an arbitrator, the costs of the cause to abide the event of the award, and the costs of the reference and the award, to be in the discretion of the arbitrator.

The arbitrator, by his

award, found that, at the date of the order of reference, a balance was due from the defendant to the plaintiffs on the account between them, consisting of the several claims and demands in the particulars of demand and set-off respectively mentioned, except and excluding from such account a claim on the part of the plaintiffs for a loss alleged to have been sustained by them on certain hats, and that "the plaintiffs were then entitled to recover from the defendant for the said balance, together with interest thereon, 184*l.* 2*s.* 1*d.*, and no more;" and as to the claim in respect of the loss on the hats, he found that no sufficient evidence had been laid before him by the plaintiffs to shew that, at the date of the order of reference, they had sustained any loss on the hats; and upon that ground, and for want of sufficient evidence of such loss, he found that the plaintiffs were not entitled under this reference to recover any thing in respect thereof. And after disposing of the several issues raised in the cause substantially in favour of the defendant, the arbitrator directed, that the defendant should, at a certain time and place, pay to the plaintiffs' attorneys on their account, the 184*l.* 2*s.* 1*d.*, and also their costs of the reference and award; and that, *at the same time and place*, the plaintiffs should pay to the defendant's attorneys, on his account, the costs which, by the order of reference, were to abide the event of the award; and that the defendant should also bear his own costs of the reference and award.

Held: first, that the award was sufficiently final with respect to the matters referred; and, secondly, that although the arbitrator had no power over the costs of the cause, his ordering them to be paid at a particular time and place, did not invalidate the award.

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The arbitrator made his award in the following terms: — “ I find that at the date of the said order of reference, there was a balance of 165*l.* 12*s.* 1*d.* due and payable from the defendant to the plaintiffs on the account between them, consisting of the several claims and demands in the particulars of demand and set-off in the said action respectively mentioned, except and excluding from such account a claim on the part of the plaintiffs for a loss alleged to have been sustained by them to the amount of 32*l.* 17*s.*, on certain varnished hats; and that the plaintiffs are now entitled to recover from the defendant, for the said balance, together with interest thereon, the sum of 184*l.* 2*s.* 1*d.*, and no more. And as to the said claim in respect of the said loss on the said hats, I find that no *sufficient* evidence has been laid before me to shew that *at the date of the said order of reference* they had, in fact, sustained any loss on the said hats; and upon that ground, and *for want of sufficient evidence of such loss*, I find that the plaintiffs are not entitled, under this reference, to recover any thing in respect thereof.”

The arbitrator, after entering fully into the different transactions between the parties, concluded his award thus: — “ And thereupon I find and award, as to the said action, and the issues joined therein, as follows, that is to say, — as to the first of the said issues, that, as to so much of the said declaration as relates to goods sold and delivered by the plaintiffs to the defendant, and to money lent by the plaintiffs to the defendant, and to money paid by the plaintiffs for the use of the defendant, the defendant did promise, in manner and form as the plaintiffs have alleged, and as to the residue of the declaration, that he did not promise, as they have alleged; as to the second of the said issues, that the plaintiffs did not accept or receive the sum of money in the second plea mentioned, in manner and form as therein alleged; and as to the third of the

said issues, that the plaintiffs were indebted to the defendant, in manner and form as in the third plea alleged. And, further, I do order and direct that on the 15th of *January* next, between the hours, &c., at the office of Messrs. *W.* and *Co.*, the defendant do pay to Messrs. *W.* and *Co.*, on account of the plaintiffs, the said sum of 184*l.* 2*s.* 1*d.*, and also the costs of the plaintiff of and attending the said reference, and also such costs as they may have incurred in taking up this my award; and that *at the same time and place* the plaintiffs do pay to Messrs. *F.* and *S.*, *on account of the defendant, the costs which, by the terms of the order of reference, are to abide the event of my award*; and that all such costs as aforesaid shall, in the meantime, be taxed by the proper officer, and that the defendant do also bear his own costs of the said reference, and his own costs (if any) of this my award."

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Wilde, Solicitor-General, having, on a former day in this term, obtained a rule nisi for an attachment against the defendant, for nonpayment of the said sum of 184*l.* 2*s.* 1*d.*, and the costs, payable to the plaintiffs under the award,

Bramwell now shewed cause. This award is bad upon two grounds. First, there is no final adjudication upon all the matters referred. The arbitrator finds a certain sum to be due to the plaintiffs from the defendant "on the account between them, consisting of the several claims and demands in the particulars of demand and set-off in the said action respectively mentioned, except, and excluding from such account, a claim on the part of the plaintiffs, for a loss alleged to have been sustained by them to the amount of 32*l.* 17*s.* on certain varnished hats." As to that claim the arbitrator finds that "no sufficient evidence has been laid before him by the

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plaintiffs, to shew that at the date of the order of reference they had in fact sustained any loss on the said hats:" and "upon that ground and for want of sufficient evidence of such loss," he finds "that the plaintiffs are not entitled under this reference to recover any thing in respect thereof." The question therefore is, whether the claim for hats is finally adjudicated upon. It is submitted, that if he had intended to determine such claim he would not have adopted the language used. [*Tindal* C. J. This is a reference of all matters in difference at the time of the order; and the arbitrator finds that at the date of the order, the claim for hats was not a matter in difference. His over caution in introducing it, in order that when the claim did arise, it might not be said that it had been disposed of, will not invalidate the award.] The question, whether the plaintiffs had sustained a loss in respect of these hats had arisen; for they made a claim, and the arbitrator should have decided it. In *Petch v. Fountain* (a) to an action brought on the 27th of June, the defendant pleaded, by way of set-off, a claim against the plaintiff, which was not payable until the 1st of August. Under a judge's order, dated the 27th of July, all matters in difference between the parties, "including the claim of the defendant in the said action," were referred to arbitration. It was held, that the defendant's set-off was properly adjudicated upon by the arbitrator as a matter in difference, although not payable until after the date of the action and of the judge's order. Here, the meaning of the words used by the arbitrator is, that the loss had already taken place, and if so he was bound to adjudicate upon it. Whether a valid claim existed or not, was immaterial; it was sufficient that a claim was made, and the defendant was entitled to have it determined. The cases of *In re Tribe and Upperton* (b) and

(a) 5 *New Cases*, 442., 7 *Scott*, 441.; *Petch v. Conlan*, 7 *Dowl. P. C.* 486. (b) 3 *A. & E.* 295.

Ross v. Boards (a) shew that this award cannot be considered final. [*Erskine J.* In *Harding v. Forshaw* (b), under an order of reference of a cause, and all matters in difference between the parties, the costs of the suit and of the reference and award, and all other costs, were to abide the event, and final judgment was to be entered up for the plaintiff or the defendant according to the award. The arbitrator awarded that the plaintiff had no cause of action against the defendant; and that the plaintiff should pay to the defendant a certain sum, which he found to be due from the plaintiff to the defendant. The arbitrator then declared that his award was not intended to exclude the plaintiff from recovering the commission to which he would be entitled under a certain agreement. It was held that the arbitrator had no power to direct in which way the verdict was to be entered, but only to decide whether the plaintiff had a right of action against the defendant: and a rule to set aside the award was refused.]

Secondly, by the order of reference, the costs are to abide the event of the award. The arbitrator however has ordered them to be paid on a particular day, and at a particular place. This is clearly an excess of authority; for he had no power of disposition over the costs. All that he was authorised to do, was, to make his award, from which a certain result as to costs would follow, which it was not competent to him to alter. In *Seccombe v. Babb* (c), all matters in difference on the record in a cause were referred to arbitration, the costs of the action and of the reference, and the award, to be in the discretion of the arbitrator. The arbitrator awarded that the action should cease, and no further proceedings be taken

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(a) 8 A. & E. 290., 3 N. & P. 382. (c) 6 M. & W. 129.; S. C. per nom. *Seckham v. Babb*, 8

(b) *Tyrwh. & G.* 472., 1 M. & W. 415. *Dowl. P. C.* 167.

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therein ; that the defendant should pay to the plaintiff 50%. towards the costs of the cause and reference ; that the plaintiff should pay his own and the defendant's costs of the cause and reference, *the said costs to be taxed as between attorney and client* ; and that the plaintiff should pay the arbitrator 25%. for his fees, &c. It was held, that the arbitrator had exceeded his authority in awarding costs as between attorney and client, and that the order as to costs was so connected with the rest of the award, that it could not be rejected as surplusage. So here the payment of costs to the defendant is to be made at the same time, that he is to pay the sum awarded to the plaintiff, and the whole direction as to these payments is so mixed up together, that the part in which the arbitrator has exceeded his jurisdiction cannot be separated from the rest. It is submitted that this award is bad on the two grounds assigned, and that at all events it is so doubtful, that the court will not enforce it by attachment ; *In re Cargey. (a)*

Wilde, Solicitor-General (with whom was *Peacock*), in support of the rule. There is no uncertainty in this award, which is sufficiently final, all matters in difference having been determined. The arbitrator has excluded no matter from his consideration ; but has excluded the claim for hats from allowance, on the ground that it was not shewn to have existed at the date of the order of reference. In disallowing such claim, he has decided upon it, so far as he was called upon to do so under the submission. [He was then stopped by the court.]

TINDAL C. J. I do not think that there is any thing in the second objection taken in this case ; for although

(a) 2 D. & R. 222.

the arbitrator, by his award, has directed the defendant to receive his costs on a particular day, that does not take away his right to have them sooner, if, under the order of reference, he is entitled to them at an earlier period. The only effect the award can have in this respect is, that if the costs are not paid by the plaintiffs on the day appointed, they will be prevented from moving for an attachment for more than the balance due to them after deducting such costs. With regard to the other objection, if there is any failure in this award, it is owing to the over caution of the arbitrator, and to an anxious desire on his part to satisfy both parties that their rights have been fully investigated. It is said that the arbitrator has stated in his award, that the plaintiffs had made a claim in respect of the loss of certain hats, and that he has not adjudicated upon such claim. The order of reference was confined to matters that were in difference between the parties at the time that it was made, which alone were submitted to the arbitrator. He says, in effect, that this claim was not a matter then in difference between the parties, or, in other words, that it was not referred to him at all. Putting a fair and reasonable construction on the language of the award, it seems to me sufficiently clear, that the arbitrator has finally adjudicated upon all matters referred to him, and that the case closely resembles that of *Harding v. Forshaw*.

BOSANQUET J. It is clear that the arbitrator could not adjudicate upon any thing which was not a matter in difference between the parties at the date of the order of reference. In his award he expressly states that the plaintiffs had no ground of claim for any loss in respect of these hats at the time of the order of reference; and he gives that as a reason why the claim is excluded. He has taken into consideration the mat-

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ters in difference on the one side and the other, but has excluded this claim, because it was not then a matter of difference between the parties. With respect to the other objection, the costs are provided for by the order of reference; and although the arbitrator has awarded them to be paid on a particular day, that does not prevent the defendant from recovering them earlier, under the order.

COLTMAN J. I also think that this award may be supported. If an application had been made by either party to set aside the award, the facts would have been brought before us on affidavit. I think, however, giving the award a reasonable construction, it is, upon the face of it, sufficiently certain. It appears that no claim in respect of the loss of these hats existed at the date of the reference, but that the plaintiffs made a claim before the arbitrator, which he disallowed on the ground that they had sustained no such loss at the time of the submission. *Harding v. Forshaw* fully warrants us in taking this view of the case. As regards the costs, the defendant is not deprived of any benefit whatever by this restriction as to the time of payment, which does not prevent him from recovering them in the usual way.

ERSKINE J. As far as the facts appear on the award, the plaintiffs seem to have made a claim before the arbitrator in respect of a loss sustained upon certain hats. The effect of the award is, that the plaintiffs had sustained no such loss at the date of the submission, and were therefore entitled to recover nothing upon that ground. That is a final decision with regard to the only matter in difference respecting the hats, which could be brought before the arbitrator. But it is contended that because he has gone on to state the grounds

of his decision, namely, that no loss had been sustained at the date of the reference, the award ceases to be final. *Harding v. Forshaw*, however, shews that where an arbitrator decided that up to the time of the submission, there was no cause of action, such decision was a final determination of all matters in difference. It appears to me that this award is sufficiently final and certain. The objection as to the costs has already received its answer. The direction as to their payment was introduced for the defendant's benefit, and he has no right to complain of that which was inserted for his advantage.

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Rule absolute.

GRIFFITH v. ROBERTS.

May 4.

ASSUMPSIT, upon an agreement which the defendant undertook to prepare and to deliver to the plaintiff, within twelve weeks, etchings of certain drawings, which drawings the plaintiff was to supply; and which he had supplied for that purpose.

The defendant took out a summons for leave to plead the following pleas: first, non assumpsit; secondly, that the plaintiff did not supply the drawings; thirdly, that the plaintiff delayed for an unreasonable time to supply the defendant with the drawings, and thereby prevented

In assumpsit on an agreement to prepare and deliver within a certain time etchings of certain drawings, to be supplied by the plaintiff, an order was made at chambers allowing the

defendant to plead,—non assumpsit; that the plaintiff delivered to the defendant unfit and improper drawings; that the defendant was hindered, by the act of God and by illness, from preparing and delivering the etchings within the stipulated time; and a dispensation of the performance; but allowing him to plead one only, at his election, of the following pleas:—that the plaintiff did not supply the drawings; that the plaintiff did not supply the drawings within a reasonable time; and that the plaintiff delivered drawings unfit and improper for the purpose.

Held, that this was a proper order.

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the defendant from etching and delivering within the twelve weeks; fourthly, that the plaintiff delivered to the defendant, for the purpose of his preparing the said etchings, unfit and improper outlines; fifthly, that the plaintiff delivered unfit and improper drawings; sixthly, that the defendant was hindered by the act of God and by illness, from etching and delivering; lastly, leave and licence. The summons was attended before *Maule J.*, who allowed the first, fourth, sixth, and last pleas, but put the defendant to his election as to the second, third, and fifth pleas, one only of which was to be retained.

Shee Serjt. now moved, on behalf of the defendant for a rule to rescind so much of the learned judge's order, as put the defendant to his election as to the second, third, and fifth pleas. The three pleas in question present distinct grounds of defence, which, though differing from, are not inconsistent with, each other. [*Tindal C. J.* The second plea contains nothing more than a traverse of an allegation in the declaration. It is not a new plea. But you cannot also have the third plea, which is inconsistent with the second. *Bosanquet J.* If the drawings, as alleged in the second, were not delivered at all, the question sought to be raised by the third plea,—whether the delivery was within a reasonable time, cannot *arise*.] There is a wide difference between the omission to deliver the drawings at all, and non-delivery within a reasonable time. [*Bosanquet J.* That may be so; but the allowance of both pleas would defeat the object of the rules of *H. 4 W. 4.*] All the pleas *may* be true; and the allegations are too distinct to come within the prohibition contained in the new rules of pleading.

TINDAL C. J. It cannot be that all these pleas are true. The object of the statute of *Anne (a)* was to

(a) 4 *Anne*. c. 16.

protect defendants from the hardship of being excluded from setting up more than one defence; and the object of the new rules of pleading was, to prevent the advantage conferred on defendants by the former statute, from enabling them to put unnecessary obstacles in the way of those who were suing them, for demands claimed to be due, or for injuries alleged to have been sustained. The defendant may choose one of these pleas, but he ought not to be allowed to plead them all.

BOSANQUET, COLTMAN, and ERSKINE JJ. concurred.
Rule refused.

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CLIFFORD v. Dame FANNY HYDE PARKER.

May 6.

ante 89.

ASSUMPSIT, by the drawer, against the drawee, as acceptor, of a bill of exchange for 12*l.*, payable, at two months after date, to the order of the drawer.

Plea: *non acceptavit.* (a)

Upon the trial, before the under-sheriff of *Middlesex*, the bill, bearing a 1*s.* 6*d.* stamp, was produced; and an acceptance upon the bill, so produced, was shewn to be in the defendant's handwriting. But the bill ap-

(a) This plea admits the existence of the bill declared on, namely, a bill of exchange for 12*l.*, drawn by the plaintiff on the defendant, payable at two months after date; but in order to shew the *acceptance* of the bill, so admitted to exist, it was necessary to produce a bill with the defendants' acceptance upon it, corresponding in its terms, or in its legal effect, with

the bill so admitted. But the production of a bill, accepted by the defendant, which did not clearly express that it was payable at two months' date, would not be the production of the bill declared upon; and proof of an acceptance by the defendant of such a bill would, therefore, not be proof of an acceptance of the bill so declared upon.

Upon an issue on *non acceptavit* pleaded to an action against the drawee of a bill of exchange, the bill when produced appeared to have been altered in its date. Held, that it was incumbent on the plaintiff to give some evidence of the circumstances under which this alteration took place.

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peared to have been originally drawn at five months' date, with an alteration substituting "two" for "five." For a bill at five months, the stamp would have been insufficient. (a) No evidence was given as to the time when, or the circumstances under which, the alteration had taken place. The under-sheriff placed the bill in the hands of the jury, and told them that an alteration had, no doubt, been made, but that it was for them to say whether, in their opinion, the alteration had been made before or after the bill had been accepted.

Channell Serjt., in last term, moved for a rule nisi for a new trial on the ground of misdirection, contending that it lay on the plaintiff to offer some evidence as to the time and the circumstances of the alteration; and that the under-sheriff should have so directed the jury. He referred to *Johnson v. The Duke of Marlborough* (b); *Henman v. Dickinson* (c); and *Knight v. Clements*. (d) A rule nisi having been granted,

Talfourd Serjt. now shewed cause. The bill, upon the face of it, appears to have been altered; and the only question is, whether it was incumbent on the plaintiff to give any evidence in respect of such alteration. [*Tindal* C. J. The general rule is, that the party setting up the altered instrument, must give *some* evidence.] That must depend upon the state of the bill when inspected by the jury; *Bishop v. Chambre* (e), *Knight v. Clements*,

(a) Whether the term of payment was altered before or after the acceptance, the bill would have been a nullity until the alteration had been made; whilst it stood a bill at five months, a 2s. stamp would be necessary. If the plaintiff, therefore, had shewn that the alteration had taken place with

the assent of the defendant, the time of the alteration would not have been the less material.

(b) 2 *Stark. N. P. C.* 313.

(c) 5 *Bingh.* 183.; 2 *Moo. & P.* 289.

(d) 8 *A. & E.* 215.; 3 *N. & P.* 375.; *antè*, 890. 892.

(e) *M. & M.* 116.; 3 *Carr. & P.* 55.

and the other cases which have been cited are very obscure. It is observable that in *Knight v. Clements*, the bill had been actually negotiated (a); whereas here, the action is between the original parties, as was the case in *Kershaw v. Cox*. (b)

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TINDAL C. J. In *Kershaw v. Cox*, the alteration is stated to have been made by consent. (c) The case of *Knight v. Clements* shews, that a party setting up a bill of exchange, which, upon the face of it, clearly appears to have been altered in a material part, is bound to give some evidence of the circumstances under which the alteration took place. In that case, it is true, the bill had been negotiated; but negotiation is immaterial where, as in the present case, the liability of the party is complete before negotiation. I am therefore of opinion, that it lay upon the plaintiff to give some evidence as to the circumstances under which the alteration, which had clearly been made, took place.

Rule absolute.

(a) Negotiation appears to be material only in the case of an *accommodation* bill or note; where, until the bill or note gets into the hands of a holder for value, it is said there is *no contract*; or where, to speak more correctly, there is no contract, until such negotiation, for the payment of the bill or note — no contract of exchange (*contrat de change*) — although, undoubtedly, upon the affixing of the accommodation signature, one contract immediately arises, viz. an undertaking, on the part of the party so accommodated, accepted by the party accommodating, that the latter shall be indemnified in case the bill or note is negotiated and enforced against him.

(b) 3 *Esq.* N. P. C. 246.

(c) The insertion of the words "or order," in that case, took place in pursuance of the original intention of the parties; and it was, therefore, immaterial at what period the alteration was made. In the principal case, the alteration, which was undoubtedly in a material part, was not shewn to be in furtherance of an original intention; and, if not, the consent of the parties would not have rendered it less important to ascertain the period at which the alteration took place; as an alteration in a material part, *after the instrument was complete*, would have rendered a new stamp necessary.

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March 8.

WALLIS and Another v. GODDARD.

In debt on simple contract for 10*l.*, the defendant pleaded *nunquam indebitatus* as to all but 3*l.* 10*s.*, and to that sum a tender. The plaintiffs, by their particulars of demand, claimed 5*l.* 15*s.* The verdict, as returned upon the notes of the undersheriff, was, "We find for the plaintiffs for the full amount." The *postea* being indorsed with a verdict for 5*l.* 15*s.* debt, without noticing the issue or the tender, and without deducting the 3*l.* 10*s.* paid into court with the plea, are not hurt by the jury returning a verdict for too the plaintiffs, who had proceeded to sign judgment and tax costs, with notice of the irregularity, were allowed to amend the *postea* upon payment of the costs of the writ of error and of the application.

DEBT, for 10*l.* for goods sold and delivered.

Plea : *nunquam indebitatus*, except as to 3*l.* 10*s.*, and, as to that sum, a tender. The replication added the *similiter* to the *nunquam indebitatus*, and traversed the tender.

The plaintiffs, by their particulars of demand, claimed 5*l.* 15*s.*

At the trial before the undersheriff of *Hants*, the plaintiffs established a debt to the extent of 5*l.* 15*s.*, and the defendant produced no evidence in support of his plea of tender. The jury returned this verdict, "We find for the plaintiffs for the full amount claimed," whereupon the *postea* was indorsed as follows: "The jury, &c., say that the defendant doth owe to the plaintiffs the said sum of 5*l.* 15*s.* within demanded."

Notice was given to the plaintiffs' attorney, that the entry of the verdict upon the *postea* was informal and irregular ; notwithstanding which, he proceeded to sign final judgment and tax the costs.

Adams Serjt. moved for a rule nisi to amend the *postea*, by entering a verdict for the plaintiff for 2*l.* 5*s.* upon the first issue, and for the defendant as to the residue of the debt claimed in that issue, and for the plaintiff generally, upon the second issue. The undersheriff's notes merely shew that the jury found a verdict for the full amount claimed. [*Tindal* C. J. You

much.] The plaintiffs are obliged to come here, the defendant having brought a writ of error in consequence of the improper mode in which the *postea* is indorsed. A rule nisi having been granted,

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Wilde, Solicitor-General, shewed cause, denying that there was any thing to amend by.

Adams and *Bompas* Serjts., in support of the rule, contended that the undersheriff's notes of the finding were sufficient to afford the court the means of remodeling the *postea*, without driving the parties to argue the errors in the Exchequer Chamber, for the purpose of the case being sent down to another trial by a *venire de novo*. (a)

TINDAL C. J. There is sufficient upon the undersheriff's notes to enable us to direct the verdict to be entered in the manner prayed. From these notes it is evident that the jury meant to give the plaintiffs all that they were then claiming in the action, namely, 5*l.* 15*s.*, which would be 2*l.* 5*s.* beyond the sum brought into court upon the plea of tender. But as the plaintiffs went on, with notice of error on the record, I think the rule should be made absolute, on the terms of the plaintiffs paying to the defendant the costs of, and occasioned by, the writ of error, together with the costs of this application.

COLTMAN, MAULE, and ERSKINE JJ. concurred.

Rule absolute accordingly. (b)

(a) As to the distinction between the awarding of a writ of *venire facias de novo*, and the granting of a new trial, see 5 *Mann. & R.* 505., in *The Bishop of Exeter and Another v. Gully and Others*, in error.

(b) As to amendments allowed to be made in the record, after error brought, see *Mellish v. Richardson*, 9 *Bingh.* 125., 2 *Mo. & Scott*, 191.; *Bishop of Exeter v. Gully*, in error, 5 *Mann. & R.* 457. 499. n.

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May 8.

HARDING v. HOLDEN.

Where the execution of a *fi. fa.* is entrusted to a special bailiff appointed by the judgment creditor, who seizes goods which, upon a claim being made by a third party, he afterwards relinquishes; the proper course for the judgment creditor to take, if he wishes to issue a *ca. sa.* (without pledging himself to shew the validity of the claim made (a)) is, to request the sheriff to

return the *fi. fa.*, such request to be accompanied by a statement of the object for which such a return is required, and by an offer to indemnify.

A judgment creditor having, however, ruled the sheriff to return the writ without any such statement or offer, the sheriff obtained a rule nisi to set aside the rule to return the writ. The court discharged the rule obtained by the sheriff, on the terms of the payment of the sheriff's costs, and of giving an undertaking to bring no action against him.

LUDLOW Serjt., early in this term, moved to set aside a rule calling upon the sheriff of *Gloucestershire* to return a *testatum fieri facias* issued by the plaintiff, upon the ground that a warrant had been granted to one *A. Brotherton* as special bailiff, at the request and under the indemnity of the plaintiff's attorney. *Brotherton* had seized goods, but had relinquished the possession upon a claim being set up by a third person. He cited *De Moranda v. Dunkin* (b). A rule nisi having been granted,

Bompas Serjt. now shewed cause. The object of the plaintiff in ruling the sheriff was, to be in a situation to issue a *ca. sa.*, which he could not do, after an actual seizure, without a return to the *fi. fa.*: *Miller v. Parnell* (c). *De Moranda v. Dunkin*, upon which this rule was obtained, does not apply to this case. There, the plaintiff was seeking to fix the sheriff with an escape occasioned by the negligence of an officer appointed by himself. [*Tindal* C. J. Here, if the sheriff, in obedience

(a) *Vide infra* (c).

(b) 4 *T. R.* 119.

(c) 6 *Taunt.* 370., 2 *Marsh.* 78. In that case the sheriff appears to have seized the defendant's goods. If the

officer merely seizes and restores the goods of a *stranger*, it will be no seizure under the writ; and the plaintiff may abandon it, and issue a *ca. sa.* without a return to the *fi. fa.*

to your rule, returned *nulla bona*, you might bring your action for a false return, and prove that, notwithstanding the claim made, there were goods liable to be taken for the party's debt.] The sheriff might plead the appointment of *Brotherton* as a special bailiff at the plaintiff's request, and the indemnity given to the sheriff, as an answer to such an action: *Porter v. Viner*. (a) In *Pallister v. Pallister* (b), where the plaintiff had appointed a special bailiff or agent to manage the sale of goods under a *fi. fa.*, it was held that the sheriff was discharged, although, on being ruled to return the writ, he returned that he had sold, and made certain deductions which he had no right to make. [*Erskine J.* In that case it is said, "The proper course seems to be for the sheriff, in such a case, instead of making the return, to move to set aside the rule to return the writ; for it is clear that the court will not compel him to do so, when the bailiff has acted under the authority, or by the direction, of the plaintiff.] That was no part of the decision. The point did not arise in the case; and the observation which has been referred to is merely a statement of the opinion of the reporter as to what might be done under different circumstances. None of the cases cited by Mr. *Chitty*, viz. *De Moranda v. Dunkin*, *Beckford v. Welby* (c), *Hamilton v. Dalziel* (d), appear to authorise such a position.

Ludlow Serjt., *contra*, was stopped by the court.

TINDAL C. J. The general rule is, that laid down in *Hamilton v. Dalziel*, that where a special bailiff is appointed, the sheriff cannot be ruled to return the writ. If the plaintiff had applied to the sheriff to make a return, informing him of the object for which the return was required, and offering an indemnity, and upon the sheriff's

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(a) 1 *Chitt. Rep.* 613. n.(c) 2 *Esp. N. P. C.* 591.(b) *Ib.* 614. n.(d) 2 *W. Bla.* 952.

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refusal he had ruled him to return the writ, the court possibly (a) would not have interfered. You should first have applied to the sheriff. However, upon payment of costs, and the plaintiff's undertaking not to bring any action against the sheriff, this rule, to set aside the rule upon the sheriff, may be discharged.

COLTMAN, ERSKINE, and MAULE JJ., concurred.

Rule discharged upon the above terms. (b)

(a) *Vide Cassidy v. Steuart*, *Higgins v. M'Adam*, 3 *Younge*
antè, 437. 469, 470. & *Jerv.* 1.; *Clarke v. Palmer*,
 (b) And see *Taylor v.* 9 *B. & C.* 153., 4 *M. & R.*
Richardson, 8 *T. R.* 505.; 141.; 2 *Wms. Saund.* 61. c.

May 8.

J. W. NORTON v. R. FRASER.

A judge has no authority, without the consent of the plaintiff, to make an order to stay proceedings in an action, upon payment of the debt and costs on a subsequent day.

BOMPAS Serjt., on the part of the plaintiff, obtained a rule nisi, to rescind an order made by *Maule J.* on the 29th of *April*, to stay the proceedings on payment of the debt and costs on the 30th of *April*. The order purported to have been made "by consent;" but an affidavit made by the clerk of the plaintiff, who was an attorney, stated that no consent had been given.

Talfourd Serjt. now shewed cause upon an affidavit, stating circumstances from which it was unsuccessfully contended that consent might be inferred.

Per curiam. A judge has no jurisdiction, except upon consent of parties, to make an order for delaying the plaintiff in the recovery of the debt for which he is suing.

Rule absolute. (a)

(a) *Coleridge J.*, in a subsequent case of great hardship, expressed his regret at not having authority to make such an order.

And see *R. H. 2. W. 4. reg. 2.*
Tidd's Pract., 9th ed., 240.;
Tidd's General Rules, 15.;
Reynolds v. Sherwood, in the
 Exchequer, 8 *Dowl. P. C.* 183.
 In *Fricker v. Eastman*, 11 *East*,

319., the order was, as appears
 in another part of the report,
 by consent of the plaintiff's at-
 torney, though in stating the
 terms of the order, the consent
 is not mentioned.

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SHIRER v. WALKER.

May 6.

AN order was made by *Alderson B.* to hold the de-
 fendant to bail, upon an affidavit stating that the
 defendant was preparing to go abroad, and that he was
 selling off his goods. An application was subsequently
 made to the same learned judge upon facts at variance
 with that statement, disclosed in an affidavit made by the
 defendant, but in which he was described as "the de-
 fendant in the action," without any addition of his place
 of abode or of his degree or mystery. The learned
 judge doubted whether he could receive an affidavit in
 contradiction to that of the plaintiff, and whether the
 description of the deponent was sufficient; the rule of
H. T. 2 W. 4. reg. 5. (a) requiring, that "the addition of
 every person making an affidavit, shall be inserted
 therein;" and he referred the parties to the court.

Held, by all
 the judges,
 that affidavits
 made in an
 action by the
 plaintiff or
 the defend-
 ant are ex-
 empted from
 the operation
 of the rule of
H. 2 W. 4.,
 which re-
 quires that
 "the addition
 of every per-
 son making
 an affidavit
 shall be
 inserted
 therein."

Talfourd Serjt. moved for a rule calling upon the
 plaintiff to shew cause, why the order for holding the
 defendant to bail should not be rescinded. The rule of
 court does not apply to a party in the cause, whose place
 of abode and degree or mystery his adversary will be
 presumed to be acquainted with, more especially in the
 case of an affidavit made by a *defendant*. The latest

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(a) 8 *Bingh.* 289.

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case on the subject is *Angel v. Ihler* (a), in which the affidavit ran thus "I A., of, &c., the plaintiff in this cause, maketh oath and saith, &c.," the place of abode being mentioned, but the addition of the degree or mystery (b) being omitted. But the decision in favour of the sufficiency of the affidavit proceeded on the ground that affidavits made by the parties were not within the rule. With regard to the admissibility of affidavits in contradiction to those filed in support of the application for an order to hold to bail, there can be no reason, where the judge has been misled by incorrect statements, why an order, made under erroneous impressions, should not be rescinded. The statute allows the party arrested to apply to a judge or the court for an order or rule on the plaintiff to shew cause why the person arrested should not be discharged out of custody, and authorises either party dissatisfied to apply to the court to discharge or vary the rule. (c) A rule nisi having been granted,

(a) 5 M. & W. 163.

(b) In *Angel v. Ihler* it was considered that the like presumption arose in favour of the party's continuing to carry on the same *mystery* as of his remaining in the same *degree*.

(c) *Vide* 1 & 2 Vict. c. 110. s. 5. Before that statute the court would not entertain a motion to discharge out of custody a party arrested on mesne process, except upon an objection apparent on the face of the affidavit to hold to bail. Thus, where custom-house officers were held to bail in trover upon the plaintiff's affidavit, (before a judge's order was necessary to hold to bail in trover,) and the attorney and solicitor general moved for a rule nisi to discharge them out

of custody, on an affidavit that the goods, alleged to have been converted by the defendants to their own use, were goods seized as forfeited to the crown, and that proceedings had been taken, and were then pending, in the Exchequer to get the goods condemned; the court refused to grant the rule nisi prayed for; *Emerson v. Hawkins*, 1 Wils. 335. And in *Imlay v. Ellefsen*, 2 East, 453., the rule was extended by Lord Ellenborough, to a case where the defendant was held to bail on a judge's order. His lordship observes, that "otherwise we should be trying the merits of every case upon affidavits; and it would be holding out great encouragement to defendants to commit per-

Bompas Serjt. now shewed cause. The description of the deponent is insufficient. The rule of *H. 2 W. 4.* is clear, and it is unrestricted. Before that rule the statement of the addition of a party to the cause was not required in this court; 6 *Taunton*, 73. (a) But the decision in the case referred to, proceeded on the ground that no rule then existed in this court, like that of *M. 15 Car. 2.* in the King's Bench; in which court it had been held, in *Jarrett v. Dillon* (b), that the language of that rule, which does not differ from that of *H. 2 W. 4.*, rendered an affidavit inadmissible in which the place of abode of the plaintiff was inserted, but without any addition of "state or degree;" and this court, in the case in 6 *Taunton*, appear to have considered that the case of *Jarrett v. Dillon* was properly decided. In *Lawson v. Case* (c) the court

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jury in relief of themselves from special bail." But unless defendants could procure their discharge out of custody, *de bene esse*, upon obtaining a rule nisi, it is not very obvious how they could so relieve themselves by statements—to be immediately contradicted.

(a) Anonymous.

(b) 1 *East*, 18. That was the case of an affidavit to hold to bail, which would, at that time, be made before there was any action pending, and when the deponent would be a plaintiff in prospect only, not querens, but questurus.

In 1 *East*, 19., it is said by the court, "That this had probably been required, in conformity to the statute of additions, 1 *H. 5. c. 5.*, which made such addition necessary in all original writs of actions personal (and) appeals, and in-

dictments." But the objects of the two regulations appear to be very different. The statute of *H. 5.* was passed in order that persons whose names were the same as those of parties to personal actions, appeals, or indictments, might not be, intentionally or unintentionally, molested by sheriffs, &c., or outlawed, and might not be driven to seek a tardy and imperfect relief by suing out the writ *de idemptitate nominis*; *Fitzh. N. B.* 207. E.; *Com. Dig. tit. Idemptitate nominis*; 14 *Vin. Abr.* 331.; whereas the object of the rules of *M. 15 Car. 2.* and *H. 2 W. 4.*, was, to protect parties from being affected by the affidavits of deponents who, when the truth of their depositions is called in question, are not to be found.

(c) 2 *Dowl. P. C.* 40., 1 *Cro. & M.* 481., 3 *Tyrwh.* 489.

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of Exchequer held, that the words of the rule of *H. 2 W. 4.* “were so general — that the addition of every person making an affidavit shall be inserted therein — that it applied as much to an affidavit made by a defendant as (to an affidavit made) by any other person;” and they discharged the rule nisi, which had been obtained upon an affidavit not stating the defendant’s addition, with costs. In *Brooks v. Farlar* (a) the court discharged the rule upon the merits; but they appear to have considered the affidavit of the defendant, upon which the rule had been obtained, to be defective. (b) [*Tindal* C. J. asked *Talfourd* Serjt. if he had any case of an affidavit in which the place of abode was omitted. *Talfourd* Serjt. In *Jackson v. Chard* (c) it is stated that the addition of the deponent was omitted, — which would include the place of abode, — and that the case was decided, on the ground that affidavits by parties to the action, did not come within the rule. And in *Sharp v. Johnston* (d) an affidavit made by the defendant, without inserting his addition, was held to be sufficient; it appearing on the face of the affidavit that the defendant was a prisoner in the *Fleet*.]

Talfourd Serjt., in support of the rule. The cases cited when this rule was moved for clearly shew that the late rule does not apply to affidavits made by deponents who are parties in the cause, more especially when such deponents are defendants; *Poole v. Pembrey* (e), *Jackson v. Chard* (g), *D’Argent v. Vivant* (h), *Vaissier v. Alderson* (i), *Collins v. Goodyer*. (k)

(a) 3 *Scott*, 654., *S. C.*, differently reported, 5 *Dowl. P. C.* 361.

(b) But see the judgment of *Gaselee* J., 5 *Dowl. P. C.* 362.

(c) 2 *Dowl. P. C.* 469.

(d) 2 *New Cases*, 216., 2 *Scott*, 407.

(e) 1 *Tyrwh.* 387., 1 *Dowl. P. C.* 693.

(g) 2 *Dowl. P. C.* 469.

(h) 1 *East*, 330.

(i) 3 *M. & S.* 165.

(k) 2 *Barn. & Cressw.* 563.,

4 *Dowl. & Ryl.* 44.

TINDAL C. J. It is extremely important that the practice in all the courts should be alike. We will consult with the other judges.

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TINDAL C. J. now said. The judges have met; and they are all of opinion that the rule of *H. 2 W. 4.* does not apply to affidavits made by the parties to the cause.

In future, therefore, it will be sufficient in affidavits sworn by a party to the cause, to describe the deponent as "the above-named plaintiff," or "the above-named defendant," without inserting the place of abode or any other addition.

The rule was afterwards discussed upon the merits, and was modified to meet the facts of the case.

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May 6.

14 June 436

DEBT, upon the statute of 1 *Rich. 2. c. 12.*, against the marshal of the Queen's Bench, for an escape of *John Noel*, a prisoner, in execution at the suit of the plaintiff, for 360*l.*

Under a judge's order for particulars of the time and place at which the alleged escape took place (*a*), the plaintiff stated that the time was between the hours of eight o'clock in the evening of *Monday* the 16th of *April* 1838, and three o'clock on the following day; and that

the defendant did thereupon keep and detain, and from thence hitherto hath kept and detained, and before and at the commencement of the suit kept and detained, and still doth keep and detain the said *J. S.* in his custody, in execution at the suit of the plaintiff. The latter words are surplusage, and do not render an escape, after the commencement of the suit, and before plea pleaded, admissible in evidence, upon a replication *de injuriâ*.

A plea to a declaration against a gaoler for the escape of *J. S.* a debtor in execution, after stating a return into custody before action brought, alleged that

(*a*) See *Davies v. Chapman*, 6 *A. & E.* 767.; 1 *N. & P.* 699.

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the place was in or about *Greenwich*, in the county of *Kent*.

The defendant pleaded that the escape was without his knowledge, permission, or consent, and that before the defendant had notice of the escape, *Noel* voluntarily, and without the knowledge of the defendant, returned into his custody; and that he the defendant did thereupon keep and detain, and *always from thence hitherto hath kept and detained, and still doth keep and detain* the said *Noel* in the custody of him the defendant, as such marshal, in execution at the suit of the plaintiff.

To this plea the plaintiff demurred, assigning as cause of demurrer, that the plea did not state that the defendant had no knowledge, notice, or information of the escape between the time when it took place and the time at which *Noel* returned into the custody of the defendant as marshal; or stated any excuse for the defendant's not having, during that period, made any pursuit for the retaking of *Noel*. (a)

Upon the argument of the demurrer, the court expressed a strong opinion as to the insufficiency of the plea, but gave the defendant leave to amend. (b) Whereupon the following allegation was added to the plea: "That the defendant had not any knowledge or notice of the said escape, or of the said *John Noel* being out of the custody of the defendant, during the said time, or any part thereof, whilst the said *John Noel* was so out of the custody of the defendant, and had escaped, as above in the declaration in that behalf alleged."

To this amended plea the plaintiff replied, *de injuriâ*.

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At the trial before *Erskine J.* at the sittings in *Lon-*

(a) *Vide Rigeway's case*, 3 Co. Rep. 52.; *Bonafous v. Walker*, 2 T. R. 126.; *Griffiths v. Eyles*, 1 B. & P. 413. (b) 5 New Cases, 453., 7 Scott, 458., 7 Dowl. P. C. 429.

don after last *Trinity* term, the defendant proved, that after the escape on the 16th of *April*, *Noel* returned into custody before the 21st of *April*, on which day the action was commenced. *Andrews* Serjt. for the plaintiff, then tendered evidence of an escape after the commencement of the action, and before plea pleaded. *Talfourd* Serjt. objected, that nothing which had occurred since action brought could be given in evidence. On the other hand *Andrews* Serjt. contended, that the evidence was rendered admissible by the form of the defendant's plea, all the allegations in which were put in issue by the replication. The learned judge was of opinion that the evidence was inadmissible; and the jury returned a verdict for the defendant.

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In *Michaelmas* term last *Spankie* Serjt. (in the absence of *Andrews* Serjt.) moved for a new trial, on the ground that the evidence of the second escape had been improperly rejected; referring to *Wood v. Budden* (a), where the justification was under a right of chase, extending not only over the *locus in quo*, but also over a large district, and the plaintiff traversed the right, which was found against the defendant. There, the defendant moved in arrest of judgment, alleging that the finding was too large, as it ought to have been confined to the *locus in quo*; but it was held, that as the defendant had unnecessarily extended his claim, the plaintiff was right, in answering the extended claim, and the jury, in giving their verdict upon it. He also complained that the verdict was against the weight of evidence. A rule nisi having been granted,

Talfourd Serjt. now shewed cause. The plea contains a complete and substantial allegation, that the defendant

(a) *Hob.* 119.

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did keep *Noel* in prison until the commencement of the suit. The further statement that the defendant always from thence hitherto has kept and detained, and still does keep and detain, *Noel* in custody, at the suit of the plaintiff, is immaterial. In *Chambers v. Jones* (a) the plea was the converse of the present. It is clear, from the language of the court in that case, that they considered detention *up to the time of action brought* a complete defence. It was a sufficient answer to this action, to shew *Noel* in the defendant's custody, from the time he returned into custody up to the commencement of the action. The material question is, whether the plaintiff had a cause of action at the time he brought his action. [*Tindal* C. J. The court of King's Bench, in the case referred to, held that the plea must be understood as speaking from the time of the commencement of the action, and not from the time of plea pleaded.] If, in a declaration upon a policy of insurance, a total loss is averred, — if in an action on a warranty, the declaration alleges a scienter, — if, in an action for an escape, the escape is alleged to have been permissive, — the plaintiff is at liberty to prove a partial loss (b), a warranty, without knowledge of the existence of the defect (c), or a negligent escape. (d) The same rule applies to pleas as to declarations. In *Spilsbury v. Micklethwaite* (e), it was held, that if a plea of justification states two facts, each of which, if pleaded alone, would have been a complete defence, proof of one of the facts will support the justification. In that case (g) Sir J. Mansfield C. J. says: "The

(a) 11 *East*, 406.

(b) *Gardiner v. Croasdale*, 2 *Burr.* 904., 1 *W. Bla.* 198. And see 2 *Wms. Saund.* 203. n.

(c) *Williamson v. Allison*, 2 *East*, 446.

(d) *Bonafous v. Walker*, 2 *T. R.* 126., 1 *Wms. Saund.* 35. n. 1.

(e) 1 *Taunt.* 146. And see *Redford v. Birley*, 3 *Stark. N. P. C.* 77. (a); *Heydon v. Thompson*, 1 *A. & E.* 210., 3 *Nev. & M.* 319.; *Reece v. Taylor*, 4 *N. & M.* 471.

(g) 1 *Taunt.* 149.

only question to be considered is, whether that part of the plea which the jury have affirmed, would, alone, constitute a defence to the charge to which it is pleaded." In *Atkinson v. Warne* (a), the plaintiff having declared for *one* assault, the plea confessed and justified *two* assaults. Upon *de injuriâ* being replied, the defendant gave no evidence in justification of the second assault confessed. The court of Exchequer held, that as a justification of a second assault need not have been stated, it need not be proved. In *Jones v. Clayton* (b), where, in an action for a false return to a *fi. fa.* against *A.* and *B.*, the declaration alleged that *A.* and *B.* had goods within the bailiwick, it was held to be sufficient (under a plea of the general issue, before the new rules of pleading), to prove that *A.* had goods within the bailiwick. This is not a case of variance. "Hitherto" means until the period at which the writ is sued out. [Coltman J. The rule was moved for, on the ground that the evidence of the second escape would tend to negative the want of knowledge on the part of the present defendant. Erskine J. It was not suggested at the trial, that it could be shewn that the defendant knew of Noel's being at Greenwich on the 18th of April, the time of the first escape.]

Channell Serjt., on the same side. The allegation in question is an allegation of substance, not of description. (c) [Tindal C. J. Could the plaintiff have replied an escape after action brought? If not, could he give it in evidence?] The cases are collected in the notes to *Jones v. Pope*. (d)

(a) 5 Tyrwh. 481.; 1 C. M. & R. 827.; 3 Dowl. P. C. 483.; 6 Carr & P. 687.

(b) 4 M. & S. 349.

(c) As to the distinction between matter of allegation, re-

quiring substantive proof, and matter of description, requiring strict proof, see the cases in Mann. Index, tit. Variance.

(d) 1 Wms. Saund. 34.

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Hoggins, on the same side. In *Chambers v. Jones*, the court held, that a general allegation of detention after the recaption must be understood to mean such a detention as would excuse the escape; and, *for that reason*, they held that the general allegation of detention must be construed to mean a detention up to the time of action brought.

Andrews Serjt. in support of the rule. The fact of detention after the recaption is material, and the period of the detention, which the defendant undertook to prove, is enlarged by the terms of the plea. [*Erskine J.* Is it not a rule in pleading, that *de injuriâ* merely puts in issue those allegations in the plea which are *material*?] The defendant may have alleged more than was necessary, but having made the allegation, and that allegation not being immaterial or irrelevant, he was bound to prove it; *Wood v. Budden.* (a)

The evidence tendered with reference to the second escape would have thrown light upon the conduct of the defendant and his servants with respect to the first. [*Erskine J.* No such suggestion was made at the trial.]

TINDAL C. J. As to the first ground upon which the rule has been obtained, it appears to me that the plea is to be understood as speaking only with reference to what had occurred up to the time of action brought. The injury complained of in the declaration is, an injury which the plaintiff states, was sustained by him before the issuing of the writ of summons; and the defendant pleads that the plaintiff ought not to have or maintain his action in respect of the injury so complained of, by reason of some matter of justification disclosed in the plea. The defendant is not to be affected by any thing

(a) *Suprà*, 923.

which has occurred since action brought. It is clear that he could not have availed himself of any matter of justification arising after the commencement of the action; and it would be strange if the plaintiff were at liberty to support his action by giving in evidence matters arising after the commencement of the action, and to which neither his writ nor his declaration applied, in consequence of an idle allegation having found its way into the plea. It is a well-known piece of learning, that the replication *de injuriâ* puts in issue only the material allegations of the plea. I will put the question to this test. Suppose that the plaintiff might have replied by a new assignment (*a*), though it would be most unjust to allow him to do so. To an escape so new-assigned, the defendant might have pleaded a returning into custody before action brought. But how could he do this where the second escape set up is an escape *after* action brought? Such a new assignment would therefore be bad (*b*). If, however, the plaintiff could not reply by new assigning an escape after action brought, how unjust would it not be, to allow the plaintiff to new-assign such an escape *in evidence*.

This appears to me to be one of those cases in which a defendant, having made an allegation which is unnecessarily large, is not bound to prove a part of the allegation which, with reference to the matters charged in the declaration, is wholly immaterial (*c*). Then it is said, that the evidence of this second escape was admis-

(*a*) As to the admissibility of such a new assignment, see *Griffiths v. Eyles*, 1 Bos. & Pull. 413.

(*b*) It would also appear to be a *departure*.

(*c*) So, in justifying under *A.*, a freeholder, the ordinary course is, to plead that *A.*, at the time of the alleged trespass, was *and still is* seized, &c.

So, in justifying under *B.*, a termor, the course is, to plead that *B.* entered and became, and was *and still is*, possessed. All, however, that is material in either allegation is, that *A.* was seized, or *B.* possessed, at the time of the trespass; and the words in italics are neither material nor traversable. So, where the plea alleged that the

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sible as tending to shew that the antecedent escape was voluntary. It appears to me that for that purpose the evidence would have been totally irrelevant, and that it could throw no light upon the question raised as to the liability of the defendant in respect of the first escape.

BOSANQUET J. I am of the same opinion. The voluntary return of the party into the custody of the marshal before any action brought for the escape, is a sufficient defence. It is true that the pleader, after stating the defence, has gone on to say that *Noel hitherto* has been, and *still is*, detained in the custody of the marshal at the suit of the plaintiff. But that addition is quite immaterial to the defence. It is a superfluous allegation. The replication *de injuriâ* puts in issue so much only of the plea as is necessary to the defence, and not any superfluous or irrelevant matter which may have crept into the plea. Then I think that sufficient ground is not laid for a new trial by merely suggesting that evidence of a second escape *might* have tended to shew that the first escape was voluntary.

COLTMAN J. I am of the same opinion. With regard to the first point, it is sufficient if *Noel* returned into the marshal's custody, and continued in that custody up to the time of action brought. The statement in the plea, as to the length of time that *Noel* remained in custody after his return, is a divisible allegation. The latter part of the statement is quite immaterial. The rejection of evidence tendered for the purpose of negating an immaterial allegation is clearly

plaintiffs were the holders of the bill of exchange declared on, not only at the time of the commencement of the suit, but at the time of plea pleaded, a

replication putting in issue both these allegations was held bad on special demurrer; *Bassan v. Arnold*, 6 M. & W. 559.

no ground for sending a case to a new trial. Then it is said that the evidence was admissible, as tending to shew that the first escape was a permissive escape. I cannot see that if the evidence had been admitted for that purpose, it would have been entitled to much weight. But the argument which has been addressed to the court on this head does not apply. If evidence is tendered expressly for one particular purpose, and is rejected, it is no ground for granting a new trial that the evidence so rejected might bear upon some other point to which the attention of the judge was not directed. The case is not one which entitles itself to much favour (a), as it is the action of a creditor seeking to be paid, not by his debtor, but by a third person.

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ERSKINE J. If my attention had been called to the evidence tendered, as shewing previous knowledge on the part of the defendant of the circumstances attending the first escape, I should have considered it as evidence having some bearing upon the material allegation of the plea. But it appears to me that the evidence could not have been admissible unless it could have been connected with the original escape; and that it was not admissible as evidence of a second breach of duty on the part of the defendant. In a case tried before me on the Northern circuit, upon a point reserved, the court of Exchequer ruled, that *de injuriâ* puts in issue those facts only which are material to the defence. (b)

Rule discharged. (c)

(a) Acc. 3 Co. Rep. 44 b., in *Boyton's* case.

(b) Vide *Palmer v. Goden*, 9 Dowl. P. C. 248. (*Palmer v. Gooden*, Hurlst. & W. 79.), where in covenant upon a de-

mise of tolls, the defendant pleaded that before the rent became due the plaintiff entered upon the tolls and then ejected, expelled, &c. the defendant: the plaintiff replied that he did

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not *enter*, *eject*, *expel*, &c. It was held, by the court of Exchequer, on special demurrer, that the traverse of the entry made the replication bad. And see *Hawe v. Planner*, 1 *Wms. Saund.* 9 *a.*

(c) And see *Keilwey*, 166 *a.*; the *Sheriff of Essex's* case, *Hob.*

202.; *Sir Miles Hobert v. Stroud*, *Cro. Car.* 209.; 8 & 9 *W. 3. c.* 27.

As to the liability of the marshal in future, see the 5 & 6 *Vict. c.* 22., for consolidating the Queen's Bench, Fleet, and Marshalsea prisons, and regulating the Queen's prison.

May 6. ROBERT CHASE and JOSEPH HILL v. THOMAS GOBLE.

A conveyance by a trader of his effects at a certain place is not an act of bankruptcy, unless it be shewn that he had no other effects.

Goods seized under a *fi. fa.*, issued by *A.* against *B.* are claimed by *C.* In a feigned issue between *C.* and *A.*, to try whether the goods were, at the time of the seizure, the goods of *C.*, it is com-

petent to *A.* to negative the title of *C.* by shewing that the goods, though seized by *A.* and claimed by *C.*, passed to the assignees of *B.* by relation to an act of bankruptcy committed by *B.* before the seizure, and before the conveyance under which *C.* claims.

FEIGNED issue. The declaration stated, by way of inducement, that a *fi. facias*, directed to the sheriff of the county of the town of *Southampton*, had issued out of the court of Queen's Bench against one *Wheeler*, founded upon a judgment recovered by *Goble* against *Wheeler*, and had been delivered to the sheriff to be executed, whereby the sheriff was commanded to levy a certain sum in the writ mentioned; that by virtue of such writ the sheriff had seized certain goods of *Wheeler*, which were comprised in three indentures of mortgage, bearing date the 28th of *April* 1837, the 21st of *April* 1838, and the 1st of *September* 1838, made by *Wheeler* to *Hill* and *Chase* respectively, consisting of certain printing implements, books, and furniture. After a corresponding colloquium, the question, upon which the issue was raised, was, whether the goods were, at the time of the seizure, the property of *Chase* and *Hill*, both or either of them.

At the trial before *Coltman J.*, at the sittings at *Guild-*

hall, after last *Trinity* term, the following facts — in addition to those stated in the declaration, and admitted by the issue, — appeared. Possession of the goods was taken on the part of the claimants in *November* 1838; *Wheeler* was declared a bankrupt under a fiat granted in *February* 1840. It was contended, on the part of the execution creditor, that the possession taken in *November* 1838 was defeated by the relation of the fiat to the 1st of *September* 1838, the day on which *Wheeler* had executed the last of the three mortgages by which he conveyed the equity of redemption of the property contained in the two previous securities, such property consisting of *all* the implements, &c. of *Wheeler* at his printing-office, and all the furniture at his residence; and also, that upon this evidence, the title to the goods was, at the time of the seizure, not in the claimants, but in the assignees of *Wheeler*. For the claimants it was objected, that the execution creditor was not at liberty to set up the rights of the assignees; and *Carne v. Brice* (a) was cited. The learned judge left it to the jury to say, whether the conveyance of the 1st of *September* 1838 was made with intent to defeat or delay *Wheeler's* creditors; being of opinion that without such intent, the conveyance would not be an act of bankruptcy. The jury said, “we find that the deeds of *Chase* and *Hill* are good and valid documents, the money having been advanced, and that there is no evidence of an act of bankruptcy before *November* 1838.” Upon this finding the verdict was entered generally, for the plaintiffs in the issue.

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Channell Serjt., in *Michaelmas* term last, obtained a rule *nisi* for a new trial, on the ground of misdirection. He cited *Siebert v. Spooner*. (b)

(a) 7 *M. & W.* 183., *Hurlst.*
& *Walms.* 23.

(b) *Tyrwh. & Gra.* 1075.,
1 *M. & W.* 714.

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Bompas Serjt. now shewed cause. Before the court can inquire into the title of the assignees of *Wheeler*, a previous question must be decided, — whether it was competent to the execution creditor to set up the title of third persons. This is an issue under the interpleader act, directed in *February* 1839. The fiat in bankruptcy was not granted until 1840. The judge's order, directing the issue, was made between a party seizing by force of an execution, on the one hand, and persons claiming as mortgagees, on the other. The judgment of the court upon the interpleader rule would not bar a third party; and the only question which was intended to be decided by the issue was, which of the two parties *before the court* was entitled. *Carne v. Brice* (a) is a direct authority to shew that such a collateral inquiry cannot be gone into. In that case the question raised by the issue being, whether the goods seized under a *fi. fa.* were or were not the property of *Morgan*, the execution-debtor, Lord *Abinger* refused to receive evidence of *Morgan's* bankruptcy, which was offered for the purpose of shewing that the property, if not vested in the claimants, had passed out of *Morgan*. The court held that the evidence was properly rejected, the claimants having no right to defeat the inquiry directed by the court, by setting up the title of the assignees. Here, both parties claim under *Wheeler*. His assignees have set up no claim. The ascertaining of the fact of the title being in the assignees would not assist the court in deciding upon the rule. The issue, which has been tried, would be wholly nugatory if the goods were the property of the assignees. That issue, directed in 1839, has reference to the state of things in 1838. It was directed for the purpose of ascertaining what the sheriff should have done in 1838. The next question is, whether the objec-

](a) 7 M. & W. 183., *Hurlst. & Walms.* 23.

tion was taken in time. At the trial it was contended that the conveyance of 1st of *September* 1838 was a fraudulent deed. It was set up as an act of bankruptcy *per se*. That deed conveyed an equitable interest only. It was merely an assignment of an equity of redemption. [*Erskine* J. Was the learned judge requested to leave it to the jury to say whether there was any other property?] He was not. [*Bosanquet* J. In a case tried before me, I left this question to the jury, — whether the conveyance which had been put in to prove an act of bankruptcy committed by the execution-debtor, was a conveyance of *all* this property. The jury answered, that there was no evidence of the existence of any other property.] The attention of the learned judge, and also that of the plaintiff's counsel, ought to have been called to the point.

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Butt, on the same side. Upon the first point, the case of *Carne v. Brice* is identical with the present. Upon the second point, an observation made by the Lord Chief Justice, when the rule was moved for, is very important. His lordship said, "As the deeds purport to convey only the property of *Wheeler* upon certain premises occupied by him, the question is, whether the defendant in the issue should not have given some evidence that *Wheeler* had no *other* property." It is submitted that the defendant clearly was bound to give such evidence; and that it is too late now to insist upon this as an act of bankruptcy, by assuming it to have been a conveyance of all *Wheeler's* property; the defendant having omitted, not only to give evidence that this was all the property which *Wheeler* possessed, but also to call the attention of the plaintiffs' counsel to the point, supposing the proof to have lain upon the plaintiffs. But as it is clear that the assignees would not have been bound by the result of the issue, every

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thing connected with the bankruptcy of *Wheeler* was irrelevant to the question which was sent to be tried. Thirdly, this conveyance is protected by 2 & 3 Vict. c. 39., which provides that all contracts, dealings, and transactions, by and with any bankrupt, really and *bonâ fide* made and entered into before the date and issuing of the fiat against him, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person or persons so dealing with such bankrupt had not, at the time of such contract, dealing, or transaction, notice of any prior act of bankruptcy. Here, it is not pretended that there *was* any prior act of bankruptcy.

Channell Serjt., in support of the rule. It may be taken that the learned judge was not asked to leave it to the jury to say, whether there was any other property. Neither was it suggested that *Wheeler* had any other property. It was left to the jury to say whether the conveyance was made with intent to defraud or delay creditors, the learned judge appearing to take the same view of the third section of 6 G. 4. c. 16. as the court of Exchequer in *Siebert v. Spooner*, thought might have been taken of that section, but for the provisions contained in the fourth section. If the deed did, in fact, pass all the property which *Wheeler* possessed, it would be an act of bankruptcy, whether it was so *stated* or not; *Siebert v. Spooner*. The case of *Carne v. Brice* is distinguishable from the present. There, the trustees, who claimed the property against the execution-creditor, were made *defendants*, and they set up a title in third persons, in which title they could have no interest. (a) Here, the position of the parties is reversed. [*Ers-*
kine J. Might you not put it here, that the execution

(a) And see *Fenwick v. Laycock*, 1 Gale & Dav. 532.

is good, as against the assignees, under the eighty-first section of the 6 G. 4. c. 16. ?] If stating to the judge that the conveyance was an act of bankruptcy, inasmuch as it incapacitated *Wheeler* from carrying on his business, was not a sufficient mode of taking the objection, so as to make the manner in which the case was left to the jury a misdirection, still the defendant would be entitled to a new trial upon payment of costs.

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Saunders, on the same side. The plaintiffs in this cause, like plaintiffs in actions of ejectment, must rely upon the strength of their own title. In *Carne v. Brice* Lord Abinger C. B. refused to receive evidence of the bankruptcy of *Morgan*, the judgment debtor, on the ground that the only question intended to be raised by the issue was as to the right of the defendants as trustees for *Morgan's* wife. And *Parke* B. says (a), "I quite agree that the trustees had no right to set up the title of the assignees." [*Tindal* C. J. In general, the judgment creditor is made the defendant in the issue because he is *in possession*. (b)]

TINDAL C. J. Upon the evidence given at the trial, the verdict; as it stands, is correct. Whoever means to contend that by executing a particular deed the party has committed an act of bankruptcy, is bound to make that out; and where the deed does not in terms purport to be a conveyance of the whole of the property, he who asserts that it is a deed which does so operate, is bound to prove that it is so. That not having been done, the question is, whether there should not be a new trial upon payment of costs. If this case is to be governed by that of *Carne v. Brice*, it would be of no

(a) 7 M. & W. 187.

(b) He would therefore be the party against whom the action of trover, or for money had and received, would have been brought.

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use to send it for a new trial. But this case appears to me to differ from *Carne v. Brice*. There, the title of the assignees was wholly unconnected with that of the trustees, who claimed the goods. Here, the judgment creditor seeks to shew that the deed under which the claimants derive their title is invalid, and passed nothing to the claimants, because it was an act of bankruptcy. The invalidity of that deed, however, will only affect the property which that deed purports to convey, leaving the title of the claimants to the property contained in the prior mortgages unimpeached. The new trial must be limited to the question as to the parties interested in the property contained in the third deed, and the issue must be framed to meet this state of things. Upon payment of costs there will be a rule absolute for a new trial, as against *Hill*.

BOSANQUET, COLTMAN, and ERSKINE JJ. concurred.

Rule absolute accordingly. (a)

(a) The cause was not tried again, it being ascertained that the property seized by the sheriff was not of sufficient value to satisfy the prior charges of the 28th of April 1837, and the 21st of April 1838.

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ACKLAND v. MARY PRING, surviving Executrix May 8.
of THOMAS PRING, deceased.

COVENANT. The declaration stated, that one *A.*, on the 11th of *May* 1811, devised lands to *B.* and *C.*, upon trust, that they, and their heirs (*a*), should let the lands, and out of the rents thereof should, in the first place, pay 121*l.* 10*s.* 6*d.* which *A.* owed to *D.*; and in the next place, should pay to *E.*, *F.*, *G.*, *H.*, and *I.*, 10*l.* a-piece, as soon as the clear rents and profits of the lands would admit: and from and after the said debt and legacies (amounting in the whole to 171*l.* 10*s.* 6*d.*) should be paid and discharged, *A.* devised the lands to *Z.*, in fee. *A.* died on the 20th of *May* 1811. At the time of *A.*'s death, the lands were let to *K.* for 30*l.* a year, under a lease for twenty-one years from the 25th of *March* 1808. The trusts of the will were satisfied, and the said debt and legacies paid, by *B.* and *C.*, without any other letting of the lands.

Held: that, as no greater estate was required to perform the trusts of the will, &c., *B.* and *C.* took only a chattel interest in the lands.

In covenant against *L.*, the surviving executrix of *K.*, for a breach of one of the covenants in the indenture of lease, the declaration alleged, that on the death of *K.* all his estate and interest in the lands came to and vested in *L.* and one *M.*, since deceased; which said *L.* and *M.* were executrices of the last will and testament of *K.*; by reason whereof *L.* and *M.*, as executrices as afore-said, became and were possessed, &c.

Held: a sufficient averment that the term vested in *L.* and *M.* as executrices.

Held, also: that it was unnecessary to aver that the term had vested in *L.* and *M.* as executrices; as the vesting of a term in the lessee's personal representatives, together with the liability of such personal representatives to be sued upon the covenants of the lessee, is, in effect, a conclusion of law.

(a) *Vide post*, 954 (b).

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J. Troake, and all the great tithes thereon arising, together with all outhouses, &c., and appurtenances whatsoever to the same belonging (except as in the said indenture is excepted); to have and to hold the said messuage and tenement and premises, with the appurtenances (except as aforesaid), unto the said *T. Pring*, his executors and administrators, from the 25th of *March* then next, for the term of twenty-one years thence next ensuing; and yielding and paying therefore, yearly and every year, unto the said *J. Troake*, his heirs and assigns, the clear yearly rent of 80*l.* by four quarterly payments. And the said *T. Pring* did thereby for himself, his executors and administrators, covenant with the said *J. Troake*, his heirs and assigns, that the said *T. Pring*, his executors and administrators, should and would well and truly pay, or cause to be paid, unto the said *J. Troake*, his heirs and assigns, the clear yearly rent of 80*l.*; as by the said indenture, reference being thereunto had, would (amongst other things) more fully appear. By virtue of which demise, the said *T. Pring* afterwards, to wit, on the 25th of *March* 1809, entered into and upon all and singular the said demised premises with the appurtenances, and became and was possessed thereof, for the said term so to him thereof granted as aforesaid. And the said *J. Troake*, being so seised as aforesaid, afterwards, *and before the 1st of January* 1838 (*a*), to wit, on the 11th of *May* 1811, duly made and published his last will and testament in writing, bearing date the day and year last aforesaid, and signed by him the said *J. Troake*, and attested and subscribed, in the presence of the said *J. Troake*, by three credible witnesses, according to the form of the statute in such case made and provided (*b*), and thereby devised, unto *Robert*

(*a*) *Vide* 7 *W. 4.* & 1 *Vict.*
c. 26. s. 34.

(*b*) 29 *Car. 2. c. 3. s. 5.*

Blackmore, and William Braddick the elder, the said demised premises with the appurtenances, upon the trusts, and to and for the ends, intents, and purposes, therein-after mentioned and declared concerning the same; that is to say; upon trust that they, the said Robert Blackmore and William Braddick, and their heirs, should set and let the said premises, and out of the rents and profits thereof, should, in the first place, pay off and discharge the sum of 121l. 10s. 6d., which the said James Troake did then owe to Mary Dyer his servant; and, in the next place, should pay unto Mary, Hannah, Richard, James, and Joan, sons and daughters of his late nephew Richard Blackmore, deceased, the sum of 10l. a-piece, of like lawful money, to whom he, the said James Troake, gave the same, and to be paid unto each of them by his said trustees, as soon as the clear rents and profits of the said premises would admit of; the eldest of them to be paid first, and so on in rotation, one after the other; and from and after the debt due to Mary Dyer, and the five legacies to the aforesaid five children of the said J. Troake's said nephew, Richard Blackmore, deceased, should be paid off and discharged, he, the said James Troake, gave, devised, and bequeathed the said demised premises, with the appurtenances, unto John Blackmore, son of the said Richard Blackmore, deceased, to hold the last-mentioned premises, with the rights, members, and appurtenances thereunto belonging, unto the said John Blackmore, his heirs and assigns for ever. And the said J. Troake afterwards, and after the making of the said indenture, and during the term thereby granted, to wit, on the 20th of May 1811, died so seised of the reversion of and in the said demised premises, with the appurtenances, as aforesaid, without altering his said will as to the said devise of the said demised premises with the appurtenances. And the said John Blackmore then became, and was, seised of the

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reversion (a) so to him devised as aforesaid. The declaration then set out a conveyance by *John Blackmore*, of the premises, by lease and release of the 11th and 12th of *July* 1817, to the plaintiff. By virtue of which last-mentioned indenture, and by force of the statute made for transferring uses into possession, afterwards, and during the continuance of the term by the first-mentioned indenture granted, to wit, on the 12th of *July* 1817, the plaintiff became, and was, and from thence had been, and still was, seised of and in the last-mentioned reversion (a), of and in the demised premises with the appurtenances, according to the force, form, and effect of the said release and conveyance. Averment:—that the trusts of the said will of *J. Troake*, after the death of the said *J. Troake*, and long before the commencement of this suit, and before the rent thereafter mentioned, or any part thereof, accrued, or fell due, became, and were fully satisfied; and that the debts and legacies therein mentioned became and were duly paid off and discharged, by divers payments made at divers times, to wit, at various times between the said day of the death of the said *J. Troake* and the 8th of *May* 1821, by the said *Robert Blackmore* and *W. Braddick*, as such trustees as aforesaid; there having been no setting or letting of the said demised premises or any part, except as aforesaid. That the said *Thomas Pring* continued so possessed of the said demised premises for a long space of time, to wit, from the said 25th of *March* 1809 until he the said *Thomas Pring*, afterwards and during the said term to him granted, died, to wit, on the 1st of *November* 1824; upon whose death, to wit, on the day and year last aforesaid, *all the estate and interest of the said Thomas Pring, of, in, and to the demised premises with the appurtenances, came to, and vested in, the defendant and one*

(a) Or seised in possession subject to the term, *post*, 832.

*Susanna Pring, in her lifetime, since deceased, and whom the defendant had survived; which said defendant and the said Susanna Pring, in the lifetime of the said Susanna Pring, were executrices of the last will and testament of the said Thomas Pring deceased. By reason whereof the defendant and the said Susanna Pring, in her lifetime, as executrices, afterwards, to wit, on the day and year last aforesaid, became and were possessed of the then residue of the said term of twenty-one years, of and in the said demised premises, and from thence until the death of the said Susanna Pring were, and continued, so possessed thereof; and the defendant, as surviving executrix as aforesaid, since the decease of the said Susanna Pring, was, and continued, possessed thereof for the residue and until the expiration of the said term of years, so to the said Thomas Pring thereof granted, as aforesaid: and although the said J. Troake, in his lifetime, and the said John Blackmore and the plaintiff, since the decease of the said James Troake, had always, from the time of the making of the first-mentioned indenture, thitherto, well and truly performed, &c. all things in the said first-mentioned indenture, contained on their and each of their parts and behalves to be performed, &c. according to the tenor, &c. of the said first-mentioned indenture; yet the plaintiff said that, after the making of the said first mentioned indenture, and during the said term thereby granted, to wit, on the 25th of March 1830, a large sum of money, to wit, the sum of 262*l.* 10*s.* of the rent aforesaid, for a certain number of years of the said first-mentioned term, to wit, from the time when the said reversion of the said J. Troake, of and in the said demised premises, expectant on the said first-mentioned term of years thereof granted as aforesaid, vested in the plaintiff, and ending on the day and year last aforesaid, to wit, for eight years, and three quarters, of the said first-mentioned term, became and was due, and still was in*

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arrear and unpaid to the plaintiff; contrary to the tenor, &c. of the said first-mentioned indenture, and of the said covenant of the said *Thomas Pring* by him in that behalf so made as aforesaid. And so, &c. to the damage &c.

Special demurrer, assigning for causes—that the plaintiff has not, in or by his declaration, shew nor alleged, by direct or sufficient averment in that behalf, how the liability of the defendant to the breach of covenant, whereon the declaration is founded, arose; whether as assignee of the original lease by direct conveyance, or by operation of law; or whether in the mere character of executrix of the lessee; that the declaration is bad in form, for not averring in terms, either that the defendant took the estate and interest of the lessee by assignment or as executrix; and, as the declaration stands, it is left to mere inference and conjecture to determine whether the defendant is sought to be charged as assignee or as executrix; and that, in order to prepare and put on the record her defence to the action, the defendant is entitled to have it distinctly stated, and by way of direct and positive allegation, whether she is charged as assignee or as executrix; whereas the plaintiff has simply averred that the estate of the said *Thomas Pring* vested in the defendant, without saying how, and then proceeded to allege, as a distinct and substantive fact, the circumstance that the said *Susanna Pring* and the defendant were executrices of the last will and testament of the said *Thomas Pring*, and then goes on to aver, as a legal deduction from the premises, that the defendant and the said *Susanna Pring*, as executrices, became possessed; which is a deduction not warranted by the premises, and an informal and incorrect mode of pleading; that if the plaintiff meant to charge the defendant as executrix, he ought to have alleged, in distinct and traversable terms, that the defendant has become an executrix, and

has taken the estate, and entered into possession of the demised premises, in that character; that the declaration is defective in form and substance, in not shewing that the plaintiff took by conveyance from a party having at the time a right to convey, which right, the defendant meant to contend, the said *John Blackmore* had not in him, at the time of his alleged conveyance to the plaintiff, by reason that the estate, was then vested in the trustees of the said *James Troake's* will; and that the declaration discloses no sufficient cause of action, &c.

Joinder in demurrer.

Bompas Serjt. (with whom was *Bere*), in support of the demurrer. The first objection is, that it is not sufficiently shewn by the declaration, how the term, in respect of which it is sought to charge the defendant, vested in her and *Susanna Pring*. The averment is, that, upon the death of *Thomas Pring*, all his estate and interest in the demised premises "came to, and vested in, the defendant and one *Susanna Pring*, in her lifetime, since deceased," &c. It is clear that if the allegation had stopped there, it would have been insufficient. The question is, whether the defect is supplied by what follows:—"which said defendant and the said *S. P.*, in the lifetime of the said *S. P.*, were executrixes of the last will and testament of the said *Thomas Pring* deceased; by reason whereof the defendant and *S. P.*, in her lifetime, as executrixes as aforesaid, afterwards, to wit, on &c., became, and were, possessed, &c." [*Maule J.* Your objection is, that it is not said that the demised premises vested in them "as executrixes."] Yes. That is the only part of the allegation on which issue could be taken, and the issue raised by a traverse of that allegation would be, not whether the term had vested in them, as executrixes, but simply, whether it vested in them. [*Tindal C. J.* Looking at the whole of

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the averment, does it not appear that the term vested in them as executrixes ?] The allegation is, that it vested in them absolutely, and then, that they were executrixes; which is not equivalent to a distinct averment that it had vested in them *as* executrixes; for they might have become possessed of the term in their own right, and still might be the executrixes of the lessee. Both facts might be true, and yet the term might not be vested in them in their representative characters. [*Tindal* C. J. How could the term on *Thomas Pring's* death do otherwise than vest in them? No bequest of it is stated. *Maule* J. Is the averment at all necessary? Although the executrixes had taken care not to enter upon the premises, they would still have been liable on the contract in the lease. All that is requisite is, the continuance of the term.] The only way in which the term is shewn to continue, is by the *virtute cuius*. The question is, not whether the fact may be gathered from other circumstances, but whether it is so averred that issue can be taken upon it; for, if not, it is clearly bad on special demurrer. That such an averment may be traversed appears from 1 *Wms. Saund.* 112. n. (2). [*Maule* J. The question is, whether the averment might not be struck out of the declaration.] It is submitted that this is a material allegation, and cannot be rejected. The defendant could not be sued as executrix, when the term is vested in her absolutely. [*Tindal* C. J. Why not? *Maule* J. It might happen that the testator's estate was solvent, and that she was not.]

The more important question is, whether, upon the death of *James Troake*, the legal estate in the reversion immediately vested in *John Blackmore*, the devisee under whom the plaintiff claims, or in the trustees named in *James Troake's* will; for the averment in the declaration is, that *John Blackmore*, by virtue of the devise, then became seised of the reversion; and it is, after the allegation

that he conveyed to the plaintiff, that it is stated that the trusts of the will had been satisfied. It is submitted that, under this devise, the legal fee vested in the trustees, not in *John Blackmore*. This will was recently before the Queen's Bench, but under different circumstances from the present; *Ackland v. Lutley* (a). If the judgment in that court is to be considered a distinct decision upon this point, it is contended that it cannot be sustained. Under the will, the trustees are to *set and let* the testator's property, and, out of the rents, to pay debts and legacies. Wherever trustees are empowered to make leases, they take the legal estate. In *Doe dem. Tomkyns v. Willan* (b), the devise was, to trustees, their heirs, executors, administrators, and assigns, in trust to let the testator's freehold estates for any term they thought proper, at the best improved yearly rent, and to pay one third of the rents to the testator's wife for life, &c.: it was held that the trustees took an estate in fee. *Bayley J.*, after referring to the terms of the will, there says, "It has been argued that this merely creates a power; and that if the trustees make a lease, it would take effect out of their power, and not out of their interest. There are no words here which distinctly create a power in the trustees; and it seems to me, that when an estate is devised upon a trust, and the trustees are to demise for any term they think proper (although at the best improved rent), the true construction is, that they are to create a term out of their interest; and, if so, they must have a reversion (c) after that term entirely ceases." And *Abbott J.* said, "Not being able, therefore, clearly to see what less estate would satisfy all the objects of this will, I feel myself bound to give effect to the testator's first words, which are free from all ambiguity, and by which the trustees

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(a) 9 A. & E. 879., 1 P. & D. 686.

(b) 2 B. & Ald. 84.

(c) Vide 5 Mann. & R. 157.

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took a fee." In *Doe dem. Keen v. Walbank* (a), the testator devised to trustees and their heirs certain premises, upon trust to permit his daughter to enjoy the same, and take the rents during her life, exclusively of her husband; and from and after her decease, upon trust to the use of such child or children, and for such estate as she, notwithstanding her coverture, should, by any deed or will appoint; and for want of such appointment, then to the use of the heirs of her body; and for default of such issue, to his own right heirs for ever. Then, after devising several other lands to the trustees in the like terms, the testator concluded thus: "and I hereby will, &c., that the said trustees, and each of them, shall, may, and do in every respect, give receipts, pay money, and *demise the aforesaid premises*, or any part thereof, as shall be consistent with their duty and trust, or otherwise." It was held that the trustees took a fee-simple in the lands devised to them. Lord *Tenterden* C. J. there said (b), "If leases, made in pursuance of this direction, would take effect out of the estate of the trustees, they must take the fee; and it was therefore contended for the plaintiff, that this direction should be considered as a power, and leases might have effect as an execution of the power. The language of this clause is unlike that of any will by which a leasing power has been given; and it specifies no limit or qualification as to duration, rent, or other matter, but seems evidently intended to authorise any lease that would not be considered, in a court of equity, as a violation of the duty of a trustee. It is in this respect more large and general than the trust contained in the will of *Packington Tomkyns*, upon which the case of *Doe dem. Tomkyns v. Willan* arose, and in which it was held that the trustees took

(a) 2 B. & Ad. 554.

(b) *Ib.* 563.

the whole fee." So, here, it cannot be contended that the trustees, under this will, have a mere naked power; for, having to set and let the premises, and to pay the debt and legacies out of the rents, any leases granted by them must necessarily have taken effect out of their estate. The two cases cited must be considered as having over-ruled *Doe dem. White v. Simpson* (a). *White v. Parker* (b) is also an authority for the defendant. There, the trustees were empowered to let and set the estates, reserving the best rent that could be reasonably had, and were directed, out of the rents, to pay and discharge all outgoings for taxes, or otherwise, in respect of the premises, and to keep the premises in repair. It was held that they took the legal estate. In *Gibson v. Lord Montfort* (c), Lord *Hardwicke* says, "Here are purposes to be answered, which by possibility (and that is sufficient) cannot be answered without the trustees having a fee; viz. the payment of several annuities and large pecuniary legacies, if the personal estate is deficient." None of the cases cited in *Ackland v. Lutley*, except *Doe dem. White v. Simpson*, warrant the conclusion that the trustees, under this will, took less than the fee. If they took a fee, then the devise to *John Blackmore* could not take effect as an executory devise, for it would be too remote; *Cadell v. Palmer*. (d) The dictum of *Bayley J.* in *Doe dem. Player v. Nicholls* (e), that "It may be laid down as a general rule, where an estate is devised to trustees for particular purposes, the legal estate is vested in them so long as the execution of the trust requires it, and no longer; and, therefore, as soon as the trusts are satisfied, it will vest in the person beneficially entitled to it;" has received con-

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(a) 5 *East*, 162.

(d) 10 *Bingh.* 140., 3 *Moo.*

(b) 1 *New Cases*, 573., 1 & *Scott*, 571.
Scott, 542.

(e) 1 *B. & C.* 336., 2 *D. &*

(c) 1 *Ves. sen.* 491.

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siderable qualification in the recent case of *Doe dem. Shelley v. Edlin*. (a) It was decided upon this very will, on the equity side of the court of Exchequer, that the trustees should convey the legal estate; and an actual conveyance was made by them, either in the year 1827 or 1828. [*Maule J.* That might be merely to remove a doubt.]

Stephen Serjt., contra. The objection to the sufficiency of the allegation with regard to the vesting of the term in the defendant as executrix, has already received an answer from the court. It abundantly appears that it vested in her in that character; but if not, the allegation is perfectly immaterial. The objection arises from confounding an action, arising from privity of estate, with one founded, like the present, on contract. Here, the defendant is proceeded against, because her testator made a contract which has been broken; and, although charged as executrix, she might, if the plaintiff had thought proper, have been charged as assignee of the term; *Buckley v. Pirk*. (b) The defendant has no right, as contended, to traverse the allegation, that the term came to her as executrix, for that would raise an immaterial issue: all that she could traverse would be, the fact of her being executrix; 1 *Wms. Saund.* 112. n. (2.) *Holliday v. Fletcher*. (c)

With respect to the principal question, it has already been decided by the court of Queen's Bench in *Ackland v. Lutley*, in a judgment upon which they took time to consider. It is submitted that, under the will, the fee vested in *John Blackmore*, subject to a chattel interest in the trustees, and that *John Blackmore* had a vested legal estate, which was capable of being assigned, and was assigned long before any of the rent sought to be

(a) 4 *Ad. & E.* 582. 589.

(b) 1 *Salk.* 316.

(c) 2 *Lord Raym.* 1510.,

2 *Strange*, 781.

recovered by this action became due. With regard to devises to trustees, the general rule, — that laid down by *Bayley* and *Holroyd J. J.* in *Doe dem. Player v. Nichols*, and adopted (with a slight qualification, which has no bearing on the present case) in *Doe dem. Shelley v. Edlin*, and again recognised by the court of Queen's Bench, in *Doe dem. Cadogan v. Ewart (a)*, — is, that trustees take only such an estate as the purposes of the trust require. Here, the trustees are merely “to set and let the said premises,” and out of the rents to pay and discharge a debt of 12*l.* 10*s.* 6*d.*, and five legacies of 10*l.* each; and any estate that would enable the trustees to raise those sums would fully satisfy the terms of the devise. *Doe dem. White v. Simpson* is directly in point for the plaintiff; and so far from being overruled by *Doe dem. Tomkyns v. Willan*, it was distinctly recognised in *Doe dem. Player v. Nicholls*. The rule is, that where there is a devise in a will, upon trust to pay certain sums out of the rents and profits, the trustees take only a chattel interest. *Cordal's case. (b)* The same doctrine was recognised in *Carter v. Barnardiston (c)*.

If the argument on the other side be correct, there would have been no necessity to enact the thirtieth section of the 7 *W. 4. & 1 Vict. c. 26. (d)*

There are numerous authorities which establish that the mere circumstance that the devise is to the trustees and their heirs, does not vary the general principle;

(a) 7 *A. & E.* 636. 666.

(b) *Cro. Eliz.* 316.

(c) 1 *P. Wms.* 505. 509.; *Barnardiston v. Carter*, 3 *Bro. Parl. Cases*, 2d ed. 64.

(d) “That where any real estate (other than, or not being, a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee

simple, or other the whole estate or interest which the testator had power to dispose of by will, in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him, expressly or by implication.”

As to this enactment, see *Hayes's Introduction to Con-*

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Goodtitle dem. Hayward v. Whitby (a), Doe dem. Weedon v. Lea (b), Water v. Hutchinson (c), Nash v. Coates (d).

The cases in which, although the devise was to them and their heirs, trustees have been held to take an estate for life only, are equally applicable in favour of the plaintiff. *Shapland v. Smith (e), Sylvester dem. Law v. Wilson (g). Doe dem. Tomkyns v. Willan, and Doe dem. Keen v. Walbank* are both distinguishable from the present case. In the former of those cases the power of the trustees was, "to let for any term they shall think proper, at the best yearly improved rent that can be got for the same;" in the latter, the terms of the clause creating the authority to lease were, as was observed by Lord *Tenterden*, still "more large and general."

Bompas Serjt., in reply. Great stress has been laid on *Doe dem. Simpson v. White*. But in that case the trustees could only have taken the fee by implication; whereas here the words of the will, on the face of them, clearly give the trustees a fee.

The case of a devise upon trust to receive rents is very different from the present. *Carter v. Barnar-*

veyancing and the New Statutes, vol. i. 384., 5th ed. In the same volume, p. 353., it is said, "A train of inadvertent modern decisions had involved some questions of construction in a state of embarrassment, which seemed to require that the judicature should either revise its doctrine, or stand corrected by the legislature. Such was the question as to the quantity and quality of the estate taken by trustees or executors, under an indefinite gift." But although the legislature has now rejected a rule of construction under which the intention of the testator was

perhaps seldom, if ever, allowed to prevail, it is to be observed that the enactment is not *declaratory* but *prospective* (sect. 34.). In wills, therefore, made before the 1st of *January* 1838, as in the principal case, the rule of construction established in *Doe dem. White v. Simpson*, is not interfered with. And see *infra*, 954. (b).

(a) 1 *Burr.* 228.

(b) 3 *T. R.* 41.

(c) 1 *B. & C.* 721., 3 *D. & R.* 58.

(d) 3 *B. & Ad.* 859.

(e) 1 *Bro. C. C.* 75.

(g) 2 *T. R.* 444.

diston was the subject of considerable controversy; and it ended in a compromise. In *Cordal's* case it was held, that the trustees took a chattel interest only. But the defendant relies upon the distinction which is observable between the two classes of cases. Where the power is to raise money by letting the devisor's lands, the devisees take the fee unless a different estate is pointed out by the will.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court.

This was an action of covenant brought against *Mary Pring*, as surviving executrix of *Thomas Pring* deceased, upon a lease made by one *James Troake* to the said *Thomas Pring*, bearing date the 15th of *April* 1808, to hold from the 25th of *March* then next ensuing, for the term of twenty-one years, at the rent of 30*l.* per annum; and the action was brought for eight years and three quarters of the said rent, then in arrear. The declaration stated, that the lessor, by his will, devised to one *Robert Blackmore* and one *William Braddick* the elder, upon the trusts therein mentioned, viz. upon trust that they and their heirs should set and let the said premises, and out of the rents, in the first place, should pay off and discharge the sum of 121*l.* 10*s.* 6*d.*, which he then owed to one of his servants; and, in the next place, should pay to his five great nephews and nieces the sum of 10*l.* a-piece, as soon as the clear rents and profits of the said premises would admit of; and from and after the said debts due to his servant and the five legacies should be paid off and discharged, then he gave and devised the demised premises unto *John Blackmore* in fee. The declaration then alleged the death of the devisor, so seised; "and that thereupon the said *John Blackmore* then became, and was, seised of the reversion

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so to him devised as aforesaid." It then alleged a conveyance from *John Blackmore* to the plaintiff, in fee. It then averred that the trusts of the will, before the commencement of the suit, and before the rent became due, were fully satisfied, and that the debts and legacies mentioned in the will were duly paid by the said trustees, there having been no other setting or letting of the premises than to the said *John Pring*. And the declaration further alleged, that upon the death of the lessee, all the estate and interest of the said lessee became vested in the defendant and one *Susanna Pring*, since deceased, whom the defendant has survived, as executrixes of the said *Thomas Pring*; by reason whereof the two executrixes became possessed of the residue of the said term of twenty-one years, and the defendant, as surviving executrix as aforesaid, since the death of the said *Susanna*, became, and was, possessed thereof until the expiration of the said term of years.

Upon a demurrer to this declaration, one objection raised was, as to the allegation, that the estate vested in the defendant and *Susanna Pring* as executrixes, viz whether, in point of form, such allegation was sufficiently precise to enable the defendant to take an issue thereon. But we see no real ground of objection to this averment, which is, in effect, a conclusion of law, the term vesting, *by law*, in the personal representative, and the lessor having the right to sue the personal representative upon the covenant of the testator.

But the principal objection that has been raised and argued before us, has been, as to the title of the plaintiff; as to which the question is, whether the trustees named in the will, took an estate in fee, or merely a chattel interest; for if they took an estate in fee, then the allegation in the declaration, that *upon the death of the lessor*, the devisee, *John Blackmore*, became, and was seised of the reversion so to him devised, is not true in point of

law; whereas, if they took no more than a chattel interest, the allegation is correct; for, in that case, he would take the fee, at the death of the testator, *James Troake*, subject to their chattel interest. (a) And we are of opinion that, in order to carry into effect the trusts of this will, it was not necessary that the trustees should take more than a chattel interest. The estate is devised to them, not upon a general trust to pay all the debts of the testator, but upon trust to pay a specific debt and specific legacies, amounting altogether to no more than the sum of 171*l.* 10*s.* 6*d.* When, therefore, it is admitted, as it is alleged in the declaration, that the estate is let for the sum of 30*l.* per annum, there can be no reason for supposing, at the time of the death of the lessor, when his will took effect, that there would be any necessity that the fee, or any larger interest than a chattel interest, should be vested in the trustees. (b)

The case appears to us to fall within the doctrine laid down in *Doe dem. White v. Simpson* (c), which is always considered a leading case upon the subject. There, a power of granting building and other leases

(a) *Vide antè*, 820. (a).

(b) The will was made on the 11th, and the testator died on the 20th of *May* 1811; the *gross* amount of the rent for eighteen years, receivable after the death of the testator, would be 540*l.*; what the *net* rent,—the rent applicable to the payment of the 171*l.* 10*s.* 6*d.*—was, did not appear. But the testator might have lived to the last year of the term; and it must be mere matter of conjecture, at what period, within or after the term, the testator, on the 11th of *May*, the day on which he made his will, expected to die. It is possible, however, to suppose that the intention of the testator was, that

the trustees should, or should not, take the fee, according as the state of things existing at the time of his death, might require.

It is also observable that as the day of the testator's death is laid under a *scilicet*, (even supposing that the omission of the *scilicet* would have had the effect of making the precise day material and traversable) the court appears to have had no judicial information as to the period of his death, except that it took place before the rent sued for, namely, *some* rent, not exceeding 262*l.* 10*s.*, became due, *i. e.* before the 25th of *March* 1820.

(c) 5 *East*, 162.

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was given to the trustees: it was held nevertheless that they did not take the fee, or any larger interest than was necessary for the execution of the trusts reposed in them. Lord *Ellenborough* (p. 171.), after observing that the authorities referred to, viz. *Co. Litt. 42. a.*, and Sir *W. Cordel's case (a)*, establish the proposition, that if an estate be devised to executors generally, for payment of debts, they will take only a chattel interest (*b*), proceeds thus, "from whence it appears to be a fair inference, that where the purposes of a trust can be answered by a less estate than a fee-simple, a greater estate than is sufficient to answer such purpose shall not pass to them, but that the uses in remainder limited on such lesser estate so given to them, shall be executed by the statute." In the cases relied upon on the part of the defendant, where the trustees have been held to take in fee, the powers given to the trustees shewed the intention of the testator that they should take the fee. Thus, in *Doe dem. Tomkyns v. Willan (c)*, the estates were given to the trustees and their heirs, upon trust, to demise for any term they might think proper. A similar observation applies to the cases of *Doe dem. Keen v. Walbank (d)*, and *Doe dem. Shelley v. Edlin (e)*, and the other cases cited. In the present case no one could suppose,

(a) 8 *Co. Rep.* 96. a.

(b) The ground of the proposition, both in *Co. Litt. 42. a.* and Sir *W. Cordel's case*, is, that if a *general* devise in trust were construed literally, it would operate only as a devise for the *lives* of the devisees, who might die before the debts were paid. *Vide antè*, 17. (d). These authorities, upon which the whole modern doctrine is founded, appear to have no application where, as here, there is an express limitation to the *heirs* of the devisee, and

the question is, whether the *fee* or a chattel interest passes. However nearly the facts of one case may resemble those of another, the inference derivable from the decision in the first case cannot fairly be made available in deciding the second, where the decision in the first case proceeds entirely upon that which is not to be found in the second.

(c) 2 *B. & Ald.* 84.

(d) 2 *B. & Ad.* 554.

(e) 4 *Ad. & E.* 582.

at the death of the testator (*a*), that the trustees could require more than a chattel interest, and that of a very limited extent, to make the specific ascertained payments which they were directed to make out of the rents of the estate; and, therefore, consistently with the decisions in the cases above referred to, we hold that no more than a chattel interest was intended to be given to them by the will.

We, therefore, hold that the reversion of the estate vested in the plaintiff, as devisee, on the death of the testator, and that he was entitled to the arrears of rent stated in the declaration, the same being allowed to have accrued subsequently to the time when the trusts of the will had been satisfied: and, consequently, we give judgment for the plaintiff.

Judgment for the plaintiff. (*b*)

Bompas Serjt. asked leave to withdraw the demurrer and to plead, stating that he was instructed that the rent, for the recovery of which the action was brought, had been paid by the defendant to the trustees, under the belief that they took the legal estate in fee. The court suspended the judgment until the second day of *Trinity* term, to allow the defendant time to prepare an affidavit of the facts. On that day *Bompas* Serjt. produced an affidavit disclosing certain proceedings at law and in equity, as the grounds on which the defendant and her advisers conceived that they had reason to think that the trustees took the legal estate. The

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(*a*) *Vide supra*, 953. (*b*).

(*b*) And see *Hawker* v. *Hawker*, 3 B. & Ald. 537.; *Glover* v. *Monckton*, 3 Bingh. 13.; *Warter* v. *Hutchinson*, 2 Bro. & B. 349.; S. C., upon a second case out of Chancery, 1 B. & C. 721., 3 Dowl. & R. 58.; *Morrant* v. *Gough*, 7 B. & C.

206., 1 Mann. & R. 41.; *Heardson* v. *Williamson*, 1 Keene, 33.; *Barker* v. *Greenwood*, 4 M. & W. 421.; *Doe* d. *Cadogan* v. *Ewart*, 7 A. & E. 636., 3 Nev. & P. 197.; *Knocker* v. *Bunbury*, 6 New Cases, 306., 8 Scott, 414.

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court. having granted a rule nisi, *Stephen* Serjt. on the last day of *Trinity* term shewed cause, and produced an affidavit on the part of the plaintiffs, denying that the rent had been paid; as to which fact the defendant's affidavit was silent. The court discharged the rule; *Tindal* C. J. adding, that if the defendant had satisfied the court that the rent had been paid to the trustees, she might, possibly, have been allowed to plead to the action.

END OF EASTER TERM.

HIGGINS v. STANLEY.

Time at which the masters are to draw up rules for judgment as in case of a nonsuit.

THE case of *Higgins v. Stanley*, *antè*, 336., with a note of which the reporters were supplied by Mr. Serjt. *Glover*, was expressly overruled by the court of Exchequer in *Trinity* term 1842, in a case of *Heales v. Kidd*.

It has been stated, that in *Higgins v. Stanley* the rule for judgment as in case of a nonsuit was discharged, under an impression, which prevailed on the bench and at the bar, that issue had been joined at a later period than, upon an accurate inspection of the affidavits, appeared to have been the case.

The following note was handed by *Alderson* B. to the masters of the court of Exchequer.

“ In town causes.

Issue joined in, or in the vacation before, any term, motion for judgment as in case of a nonsuit may be made in the second term next after, viz. the third term inclusive: thus, issue joined in, or in vacation before, *Hilary* term, motion may be made in *Trinity* term.

The rule was pronounced by the court of Exchequer, after a conference with the court of Common Pleas respecting the case of *Higgins v. Stanley*; and overruling that decision.

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issue joined in, or in the vacation before, a non-issuable term, motion after lapse of one assize."

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Held, that this was evidence of an account stated by *A.* of the items of the account to which no objection was made. *Chisman v. Count.* Page 307

2. To connect *B.* with *A.*, as a co-promisor, it was shewn that they were the trustees of an insolvent estate, in respect of which the debt arose ; that *A.* and *B.* were at the counting-house of the plaintiffs on several occasions together ; that at a meeting of the creditors of the insolvent estate, the amount of the plaintiff's debt was stated by one of the defendants in the presence of the other ; and that *B.* had admitted in a letter that

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1. The bailiff of a large farming establishment, through whose hands all payments and receipts take place, has no implied authority to pledge the credit of his employer by drawing and indorsing bills of exchange in the name of the latter. *Davidson v. Stanley.*

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2. Nor, in the absence of all direct evidence of authority, does the nature of the employment of such a bailiff furnish any ground for inferring the existence of such an authority upon slight, or upon any other than clear and distinct, evidence of assent or acquiescence.

Ibid.

3. To fix the principal, the evidence should distinctly shew that he knew, or had the means of knowing, the acts done in his name.

Ibid.

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A., by letter, acknowledges to have received from *B.* 321*l.* 5*s.* By a contemporaneous account taken between these parties, it appears that 146*l.* 3*s.* 6*d.*, part of the 321*l.* 5*s.*, was a sum due from *C.* to *B.*, which *A.* allowed to be transferred to the debit of his account with *B.* *A.* is sued by *B.*, *inter alia*, for money lent and upon an account stated :

Held, that *A.* was not liable for the 146*l.* 3*s.* 6*d.*, the arrangement amounting to a promise, without consideration, to pay the debt of another. *French v. French.* 644

II. *Construction of,*

A. writes to *B.*, "I hereby agree, according to our conversation of last evening, to pay you fifty guineas for the occupation of your first floor furnished, from March 4. to September 4. I also agree either to occupy the said rooms from September 4. to December 4., furnished, on the same terms, that is to say, twenty-five guineas for the three months; or take them unfurnished at the rate of eighty guineas per annum." Held that *B.* may declare as upon an agreement,—to pay him for the occupation of the first floor furnished,

from *March 4. to September 4.*, the sum of 52*l.* 10*s.*, and either to occupy the rooms from *September 4. to December 4.* furnished, on the same terms, that is to say, 26*l.* 5*s.* for three months, or take the same rooms unfurnished *for the said three months* at the rate of 84*l.* per annum; and that the words "at the rate of eighty guineas per annum" do not imply a contract for a year. *Atherstone v. Bostock.* Page 511

III. Stamp.

To prove the above contract, under a plea of non assumpsit in an action by *B.* against *A.* for refusing to occupy the rooms furnished till *December 4.*, or to take them unfurnished after the three months at the rate of 84*l.* per annum, *A.*'s letter was put in stamped with a 30*s.* stamp. To shew that the real contract between the parties was for a yearly tenancy of the unfurnished rooms, *A.* produced a contemporaneous letter written to him by *B.*, unstamped, in which *B.* stated that he agreed to let the rooms *by the year.* Held, that this letter was properly rejected, on the ground, that if it created a new or substituted contract, it required a 30*s.* stamp, and, that if it formed part of the original agreement, a 35*s.* stamp was required for some one of the letters, under the general stamp act, 55 G. 3. c. 184. sched. Part I. "Agreement." *Ibid.*

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3. In a submission to arbitration by an order of nisi prius, in an action between *A.* and *B.*, it is stipulated that a certain sum of money shall be placed by *B.* in the hands of *C.*, the arbitrator, to abide the event

of the award. *B.*, after placing the sum in the hands of *C.*, becomes bankrupt. The submission is not revoked: nor are the assignees of *B.* entitled to demand back the money. *Taylor v. Marling.* Page 55

4. Under such circumstances *C.* has not a mere authority, but an authority coupled with an interest.

Ibid.

5. Upon the reference of a cause, and other matters in difference, though the arbitrator finds no damages, and orders no damages to be entered, the costs may be taxed upon the award. *Ibid.*

6. Where matters in difference are referred to the award of three arbitrators, or any two of them, the parties to the submission having a right to the *joint* judgment of at least two of the arbitrators upon the points submitted to their decision. *Little v. Newton.* 351

7. Therefore two of such arbitrators cannot delegate their authority to the third. *Ibid.*

8. Where, therefore, a submission had been made to *A.*, a barrister and *B.* and *C.*, two merchants, or any two of them, and after evidence had been given on each side, *A.* and *B.* agreed to make their award in favour of the plaintiffs for a certain sum, subject to the decision of *A.* upon a point of law, to which award *C.* did not altogether agree, but he agreed to the point of law being left to *A.*; and the latter, without any further communication with either *B.* or *C.*, decided

the point of law for the plaintiffs, and drew up the award in their favour for the sum which had been mentioned, and after signing it at *Birmingham* sent it to *London* to be executed, by whichever of the other arbitrators agreed with him, where it was executed on the following day by *B.*: the court set the award aside. *Little v. Newton.*

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9. If *A.* and *B.*, having finally agreed on the terms of the award when they last met, had affixed their signatures thereto at different places and times, *quære*, whether the award could have been objected to on that ground. *Ibid.*

10. Mistake or misconduct of arbitrators not pleadable to an action on award. 852, (a).

11. Where a gross mistake is made by arbitrators, though not apparent on the face of the award, the court will sometimes set aside the award, as for *misconduct* of the arbitrators. *In re Hall and Hinds.*

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12. As where *A.* claiming two sums to be due to him from *B.*, the contention before the arbitrators is merely whether *A.* is entitled to both or to one only of those sums, and the arbitrators, meaning to give *A.* both sums, instead of adding them together, deduct the smaller from the larger, and instead of directing the payment to be made by *B.* to *A.*, award that the payment shall be made by *A.* to *B.* *Ibid.*

13. Award may be set aside for mis-

conduct of arbitrators, under stat.
9 & 10 W. 3. c. 15. s. 2.

Page 853, (a).

14. An objection to an award on the ground of irregular and improper conduct on the part of the arbitrators, was held to be waived where such conduct had been known to the injured party three weeks before the award was made, without any objection been taken. *Bignall v. Gale.* 830
15. Where a cause had been referred at nisi prius, and no step had been taken from May 1837 to January 1841, and the arbitrator had inadvertently omitted to enlarge the time for making his award, the court refused to interfere. *Lambert v. Hutchinson.* 858
16. *Semble*, by Tindal C. J., that where an arbitrator has power to enlarge the time, and omits to exercise his power, the courts have no authority to enlarge the time under the 3 & 4 W. 4. c. 42. s. 39. *Ibid.*
17. Held, that the court has no jurisdiction over fees of arbitrators, paid under protest upon taking up the award, but not specified in the award itself; or over a sum paid, under a similar protest, to an attorney for preparing the award; even in a case where the reference is, in a pending cause, under a judge's order, made a rule of court. *Dossett v. Gingell.* 870
18. *Semble*, that the remedy is by action for money had and received. *Ibid.*
19. All matters between the parties

in a certain cause were, under a judge's order, referred to an arbitrator, the costs of the cause to abide the event of the award, and the costs of the reference and the award, to be in the discretion of the arbitrator.

The arbitrator, by his award, found that, at the date of the order of reference, a balance was due from the defendant to the plaintiffs on the account between them, consisting of the several claims and demands in the particulars of demand and set-off respectively mentioned, except, and excluding from such account, a claim on the part of the plaintiffs for a loss alleged to have been sustained by them on certain hats, and that "the plaintiffs were then entitled to recover from the defendant for the said balance, together with interest thereon, 184*l.* 2*s.* 1*d.*, and no more;" and as to the claim in respect of the loss on the hats, he found that no sufficient evidence had been laid before him by the plaintiffs to shew that, at the date of the order of reference, they had sustained any loss on the hats; and upon that ground, and for want of sufficient evidence of such loss, he found that the plaintiffs were not entitled under the reference to recover any thing in respect thereof. And after disposing of the several issues raised in the cause substantially in favour of the defendant, the arbitrator directed, that the defendant should, at a certain time and place, pay to the plaintiffs' attorneys, on their ac-

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count, the 184*l.* 2*s.* 1*d.*, and also their costs of the reference and award; and that, *at the same time and place*, the plaintiffs should pay to the defendant's attorneys, on his account, the costs which, by the order of reference, were to abide the event of the award; and that the defendant should also bear his own costs of the reference and award:

Held: first, that the award was sufficiently final with respect to the matters referred; and, secondly, that although the arbitrator had no power over the costs of the cause, his ordering them to be paid at a particular time and place did not invalidate the award.

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20. An arbitrator to whom a cause was referred, with liberty, if he should think fit, to report specially to the court, set out in his award a long statement of the evidence, leaving the court to draw inferences of fact: Held, that this was not a due exercise by the arbitrator of the authority entrusted to him. *Jephson v. Hawkins.* 366
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2. To a count in assumpsit on such an agreement, non assumpsit is a sufficient plea. *Filmer v. Burnby.* 529
3. In assumpsit upon a parol agreement, the defendant cannot, under non assumpsit, shew that an agreement, which was once a perfect contract, has since merged in a contract by deed. (Per Maule J.) *Ibid.*

4. To a count containing an allegation — that the plaintiff consented and agreed not to take any further proceedings in a certain other action between the plaintiff and the defendant, and that by an order made by Mr. Justice A., it was ordered that all proceedings in the said action should be stayed, and that the same then were and thence hitherto have been and still are stayed, — the defendant pleads, that the further proceedings in the said action have not been and are not stayed according to the plaintiff's agreement in that behalf, but on the contrary thereof, the said action is still depending and not discontinued or stayed; and that it is by the said order of Mr. Justice A. ordered that, upon payment of, &c., [the debt for which that action was brought,] together with interest thereon, on, &c., all further proceedings should be stayed; and that unless the said debt and interest were paid as aforesaid, the plaintiff was to be at liberty to sign judgment and issue execution for the amount, with costs of judgment, &c. Replication, that plaintiff did consent and agree not to take any further proceedings in the said action, and did cease, and hath from thence hitherto ceased, to prosecute the same, and all further proceedings therein were and have been stayed, according to the plaintiff's agreement in that behalf, — concluding to the country. Held, that upon the issue raised by this replication,

the plaintiff was bound to prove an absolute stay of proceedings; and that such absolute stay of proceedings was disproved by the judge's order, which, upon production by the plaintiff, appeared to be in the conditional form stated in the plea. *Filmer v. Burnby*.

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5. An allegation of an offer to pay a "just and reasonable sum" in satisfaction of a demand for an attorney's bill of costs, is not established by proof of an offer to pay the costs *when the bill is taxed*.

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2. Proceedings under a fiat in bankruptcy before country commissioners, appointed under 1 & 2 W. 4. c. 56., are not proceedings at law or in equity, requiring the delivery of a signed bill of costs, under 2 G. 2. c. 23. s. 23. *Harper v. Williams.* 815

3. On the taxation of an attorney's bill as between attorney and client, more than one sixth of the amount was struck off in consequence of all charges being disallowed, previous to the 15th of July 1837,

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BOND.

BANKING COMPANY

1. The plaintiffs having obtained judgment in an action against a public officer of a banking company, under the 7 G. 4. c. 46., sued out a *scire facias* against fifteen persons, whom they charged as members of the co-partnership. The sheriff having returned *nihil* and *non sunt inventi*, as to the whole, twelve of them voluntarily appeared, and the plaintiffs prayed execution against them. On demurrer, assigning for cause, that although fifteen persons were included in the writ, the declaration was against twelve only :—Held, that the variance between the writ and the declaration, if an irregularity, should have been taken advantage of by motion, and was not ground of demurrer. *Fowler v. Rickerby.* Page 760
2. Held, also, that in proceedings under the act the non-joinder of other parties could not be pleaded in abatement. *Ibid.*
3. The plaintiffs declared in *scire facias*, reciting a judgment recovered against one M., one of the public registered officers, for the time being, of a banking company, under the 7 G. 4. c. 46., and prayed execution against certain

parties who were alleged to have been, at the time of recovering the judgment, and still to be, members of the co-partnership. Plea, that at the time of the said recovery the said *M.* was not one of the public officers of the said co-partnership in manner and form as the plaintiffs had alleged; concluding to the country: Held, on special demurrer, that as the plea traversed matter neither expressly alleged in the declaration nor necessarily to be implied, it was bad for not concluding with a verification. *Fowler v. Rickerby.*

Page 760

4. Held, also, that if it was intended by the plea to allege that *M.* had *ceased* to be the public officer of the company after the commencement of the action, and before judgment recovered, the defence was insufficiently stated. *Ibid.*

BANKRUPT

See ARBITRAMENT, 3.

ATTORNEY, 3.

PRACTICE, II. iv. 4.

WARRANT OF ATTORNEY.

I. *Act of bankruptcy.*

A conveyance by a trader of his effects at a certain place is not an act of bankruptcy, unless it be shewn that he had no other effects.

Chase v. Goble. 930

II. *Assignment in, effect of,* 690, (c).

Goods seized under a *fi. fa.* issued by *A.* against *B.* are claimed by *C.* In a feigned issue between *C.* and *A.*, to try whether the goods were, at the time of the seizure, the

goods of *C.*, it is competent to *A.* to negative the title of *C.* by shewing that the goods, though seized by *A.* and claimed by *C.*, passed to the assignees of *B.* by relation to an act of bankruptcy committed by *B.* before the seizure, and before the conveyance under which *C.* claims. *Chase v. Goble.*

Page 930

III. *Whether proceedings in, before Chancellor, are proceedings in Chancery.* 828, (a).

BANKRUPTCY

See ATTORNEY, II. 2.

BARON

As to certifying or recording, 452, (a).

BARON AND FEME

See BOND,

HUSBAND AND WIFE,
PLEADING, IV. 2, 3.

BENEFICE

See APPROPRIATION,
CHURCH.

BILL OF COSTS

See ASSUMPSIT, 5.

ATTORNEY, II.

BILLS AND NOTES

See AGENT I. 1, 2.

PLEADING, I. ii. 2. iv.

III. 1.

PROCURATION,

SURETY,

WITNESS.

I. *Alteration.* 910, (a).

1. Only material in case of accommodation bill or note. 911, (a).

2. Where new stamp required in consequence of. Page 911, (c).

3. In an action by the payee against the maker of a promissory note, the note, on being produced, appeared to have been altered; the words "or order" having been substituted for "or other." The attesting witness who had prepared the note stated that he could not say whether the alteration was in his writing or not, but that he ought to have drawn the note originally with the words "or order." The defendant had paid two years' interest on the note: Held, that this was reasonable evidence from which it might be inferred that the alteration had taken place with the defendant's consent. *Cariss v. Tattersall*. 890

4. Upon an issue on *non acceptavit* pleaded to an action against the drawee of a bill of exchange, the bill when produced appeared to have been altered in its date. Held, that it was incumbent on the plaintiff to give *some* evidence of the circumstances under which this alteration took place. *Clifford v. Parker*. 909

II. Acceptor.

1. In an action by the payee against the acceptor of a bill of exchange, the defendant pleaded, that before the bill became due, and whilst the plaintiff was the holder thereof, and before the commencement of the action, the plaintiff released the bill; not alleging that the release was *after* the acceptance.

Held, on demurrer, that the plea was bad for the want of such allegation. *Ashton v. Freeston*. Page 1

2. In an action by *A.*, the drawer and payee of a bill of exchange against *B.*, *C.*, and *D.* as acceptors, *D.* pleads that *B.*, *C.*, and *D.* were partners, and that the bill was accepted by *B.* and *C.*, without his knowledge, privity, or consent in respect of a debt contracted by *B.* and *C.* before the partnership, and not in respect of a debt relating to the partnership. Upon a replication of *de injuria* to this plea, issue must be found for the plaintiff if it appear that the consideration of the bill was a debt which arose partly before and partly after the commencement of the partnership.

Semble, that the proper replication would be *non acceptavit*. *Wilson v. Lewis*. 197

3. Payment by a stranger of the amount of a bill of exchange to the bankers at whose house the bill is, by the acceptance, made payable, under an arrangement with such bankers, whereby the party paying obtains possession of the bill for a collateral purpose of his own, is not a payment of the bill *by the acceptor*. Nor can such payment, if made before the bill becomes due, be considered as a payment for the honour of an indorser. *Deacon v. Stodhart*. 317

4. Where, therefore, to a count by the executors of *A.*, the indorser, against *B.*, *C.*, and *D.*, the acceptors of a bill, the defendants pleaded payment, and the evidence was that

A. had placed the bill in the hands of *E.*, in order to be presented, who improperly discounted it, and, to regain possession of it, paid the amount into the bankers of *B.*, *C.*, and *D.* the acceptors, and then returned the bill to *A.*; it was held that this evidence negatived the plea. *Deacon v. Stodhart.*

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BISHOP

See CHURCH.

BONA FIDES

See EVIDENCE, I. 1.

FALSE REPRESENTATION.

Sufficiency of, without reasonable ground of belief. 475, (a).

BOND

1. Delivery of to third party, and subsequent refusal by obligee, effect of, 678, (b).
2. Delivery to feme covert, and refusal by baron, effect of, *Ibid.*
3. Given for valid demand, and also for debt made void by stat. void *in toto.* 863, (d).
4. In an action upon a bond, the condition of which was for the honest and faithful service of a banker's clerk, three breaches were assigned, viz.,—general misconduct, irregular and unbusiness-like conduct, and not faithfully accounting. An arbitrator to whom the cause was referred found specially that, on a certain day, the clerk made an erroneous balance sheet, failing to exhibit, as it should have done, a surplus

CANCELLATION.

of 100*l.*, but that there was no proof that such sum came to the hands of the clerk; and also that on another occasion the clerk having received from a customer 213*l.*, entered it in the books of the bank as 113*l.*, exhibiting on that day's balance sheet a false and unaccounted-for surplus of 100*l.*: Held, that these facts did not shew conclusively that the condition of the bond had been broken, so as to call upon the court to interfere with the inference drawn by the arbitrator. *Jephson v. Howkins.* Page 366

BOOKS OF COMPANY

See COMPANY, 3, 4, 11.

EVIDENCE, I. 2.

BREACH

See LANDLORD AND TENANT.

Necessity of showing, before action, 333, (b).

BUYER AND SELLER

See VENDOR AND PURCHASER.

WARRANTY.

CALLS

See COMPANY, 5, 6, 9, 10.

CALSTOCK

Assessionable manor of, 475

CANAL

See STATUTE, 4.

CANCELLATION

See DEED.

CAPIAS AD RESPONDENDUM

1. When it will not lie against a peer. Page 451, (c).
2. First given in actions of *account* by stat. of *Marlebridge*. 464, (a).
3. Extended to *debt*, &c. by 25 *Ed.* 3. c. 17. *Ibid.* (b).
4. To *case* by 19 *H.* 7. c. 9. *Ibid.*
5. Lay at common law in *trespass*, by reason of the breach of the peace. *Ibid.*

CAPIAS AD SATISFACIENDUM

See PARLIAMENT, III. 2.
SHERIFF, 4.

When it will lie against a peer.
437, (a).

CARGO

See SHIPPING, 1, 2, 3, 4.

CASE

See ACTION ON THE CASE.
CAPIAS AD SATISFACIENDUM,

CERTIFICATE

See ACKNOWLEDGMENT.

CHAIRMAN

See COMPANY, 11.

CHANCERY, COURT OF

See BANKRUPT.
Equitable jurisdiction of, created within time of legal memory.
466, n.

CHARTER

See CHURCH.

CHARTER-PARTY

See SHIP, 1. 5.

Memorandum of charter, what is properly so called. Page 208, n.

CHEQUE

See PLEADING, I. ii. 4.

CHURCH

The municipal corporation act, 5 & 6 *W.* 4. c. 76. s. 139., enacts that where any body corporate is seised, in its corporate capacity, of any manors, lands, tenements, or hereditaments whereunto any advowson, or right of nomination or presentation to any benefice or ecclesiastical preferment, is appendant or appurtenant, or of any advowson in gross, or has any right or title to nominate or present to any benefice or ecclesiastical preferment, every such advowson and every such right of nomination and presentation shall be sold as the ecclesiastical commissioners may direct; with a proviso, "that in any case of vacancy arising before any such sale shall have taken place and been completed, such vacancy shall be supplied by the presentation or nomination of the bishop or ordinary of the diocese in which such benefice or ecclesiastical preferment is situated."

The 1 & 2 *Vict.* c. 31. s. 1., after reciting the above clause, and also reciting that, in some instances, the manors, lands, &c. whereof some municipal corporations are seised, were granted to them with

an obligation to nominate, provide and sustain in certain churches or chapels, able and fit priests, curates, preachers or ministers for the performance and administration of ecclesiastical duties and rites therein, and for the cure of the souls of the parishioners and inhabitants of the parishes or places thereunto belonging; and although such corporation had from time to time duly nominated and provided such priests, &c., and provided stipends for their sustenance, and had either provided houses for their residence or made allowances in lieu thereof, yet such stipends and allowances had not been fixed or assured by any competent authority, and for want of any regular endowment or augmentation of such curacies, they had not become perpetual cures or benefices presentative, and the curates had not become bodies politic and corporate within the meaning of the 1 G. 1. c. 10. s. 4. and 36 G. 3. c. 83. s. 3., by reason whereof doubts had arisen, whether the right of nominating ministers to such churches and chapels could be sold under the provisions of the 5 & 6 W. 4. c. 76. s. 139.; and it is expedient that such doubts should be removed, —enacts that every right of nomination of every such priest, curate, preacher or minister, which at the time of the passing of the 5 & 6 W. 4. c. 76. was vested in any municipal corporation, &c., shall and may be sold,

as the commissioners may direct, and shall become vested in the purchaser thereof, his heirs and assigns; and that from and after such sale and assurance every such curacy, preachiership or ministry shall become a benefice presentative within the 36 G. 3. c. 83. s. 3., and every such curate, &c., a body politic and corporate within the meaning of the 1 G. 1. c. 10. s. 4., &c., and every such purchaser, his heirs and assigns, may present to such benefice, from time to time, when the same shall become vacant, &c.

By a charter of the 6th *James I.* the tithes, &c. within the lordship of *Bury St. Edmunds* were granted (subject to a then existing lease thereof for forty years) to the alderman and burgesses of that town, who agreed, after the expiration of the said lease, to pay 8*l.* 10*s.* of the tithes and glebe lands yearly to the curates and ministers of the parish churches of *St. Mary* and *St. James*, in *Bury St. Edmunds* aforesaid. By another charter of the 12 *James I.*—reciting that he expected the alderman and burgesses of *Bury* aforesaid would provide and sustain approved, able, and fit ministers and preachers of the Word, and other officers in the churches aforesaid necessary, at all times to come — the king granted to them and their successors the whole and entire rectories and vicarages of *Bury St. Edmunds*, and of the aforesaid parish churches, and the

advowsons and donations, free dispositions, and rights of patronage of the same churches, and all manner of tithes, &c.

The corporation made no endowment, and gave no fixed stipend to the ministers of either of the said churches, but subsequently to the year 1687 appointed two clergymen to each church, the one called a preacher or lecturer, and the other a curate or reader, the former being paid by a salary from the corporation, varying from 100*l.* to 80*l.* a year; and the latter, since the year 1712, deriving his only remuneration from the surplice fees and *Easter* offerings.

The office of curate or reader of the parish of *St. James* having become vacant before any sale had been effected by the corporation:

Held, that it was unnecessary to consider whether the right of presentation or nomination to that office was within the 5 & 6 *W. 4. c. 76. s. 139.*, inasmuch as it clearly fell within the provisions of the 1 & 2 *Vict. c. 31.*; and that the necessary consequence of holding it to be within the latter statute, was to bring it within the proviso of the 139th section of the former act; and consequently that such right of presentation or nomination vested in the bishop of the diocese. *Hine v. Reynolds.* Page 71

CLERK

See ACCOUNT STATED, 1.

BOND, 4.

PRACTICE, II. iv. 1.

CLIENT

See ATTORNEY, II. 1.

COALS

See STATUTE, 2.

COMMISSIONERS OF BANKRUPT

See ATTORNEY, II. 2.

COMMON PLEAS

Jurisdiction of, by fictitious *clausum fregits*, created in the reign of *Charles II.* Page 466, n.

COMMONS, HOUSE OF
Privileges of,

See PRIVILEGE, II.

PRESCRIPTION, 2.

COMPANY

See STATUTE.

1. Books of, See EVIDENCE, I. 2.
2. Minutes of former meeting, confirmation of, at subsequent meeting. 680, (a).
3. The *London Grand Junction Railway* act (6 & 7 *W. 4. c. civ. s. 145.*) directs that the company shall cause "the names of the several corporations, and the names and additions of the several persons who shall then be or who shall from time to time thereafter become entitled to shares in the said undertaking, with the number of shares they are respectively entitled to, and the amount of the subscriptions paid thereon, and also the proper number by which every share shall be distinguished, to be fairly and distinctly entered in a book to be kept by the said

company, and after such entry made to cause their common seal to be affixed thereto." By sect. 147. the company is also required to keep a book containing "a true account of the places of abode of the several proprietors of the said undertaking." By sect. 152., in any action to be brought by the company against any proprietor for the time being of any share in the said undertaking, to recover money due in respect of any call, it is enacted that, "in order to prove that the defendant was a proprietor of such share in the said undertaking as alleged, the production of the book in which the said company is by this act directed to enter and keep the names and additions of the several proprietors from time to time of shares in the said undertaking, with the number of shares they are respectively entitled to, and of the places of abode of the several proprietors of the said undertaking, and of the several persons and corporations who shall from time to time become proprietors thereof, or be entitled to shares therein, shall be *prima facie* evidence that such defendant is a proprietor, and of the number and amount of his shares therein:"

Held, that the book referred to in the 152d section was the book which the company were directed to keep by the 145th section; and that a book kept by them which was *intended* to be kept under the provisions of the last-mentioned

clause, containing the names and additions of all persons whom the company *supposed* to be the persons entitled to shares, together with the numbers of those shares, though not in all cases the amount of subscription paid thereon, and also the proper number by which each share was distinguished, and which book was sealed from time to time by the common seal of the company, was a sufficient compliance with the act, so as to render the book admissible in evidence, notwithstanding the book contained the names of persons not entitled to shares, and omitted those of others who were; and although there were some entries to which no seal had ever been affixed:

Held, also, that the *prima facie* evidence of the defendant being a proprietor, established by the production of the book, was not rebutted by proof that a third party was the original subscriber in respect of the shares in question. *London Grand Junction Railway Company v. Freeman.* Page 606

4. By their act of incorporation, a railway company are required to cause the names of the several corporations, and the names and additions of the several persons, who shall be or become entitled to shares in the undertaking, with the number of shares they are respectively entitled to, and the amount of the subscriptions paid thereon, and the proper number by which each share shall be dis-

tinguished, to be entered in a book to be kept by the company; and after such entry made, to cause their common seal to be affixed thereto. They are further required to enter and keep, in some book to be provided for that purpose, a true account of the names of the several corporations, and of the names and places of abode of the several persons, who shall be so entitled. The act provides that in order to prove that a defendant is proprietor of the shares in respect of the calls upon which he is sued, the production of the *books* in which the company are directed to enter and keep respectively the names and additions of the several proprietors of shares in the undertaking, with the number of shares they are respectively entitled to, and an account of the names of the several corporations, and of the names and places of abode of the several persons, who shall, from time to time, be entitled to shares in the undertaking, shall be *prima facie* evidence that such defendant is a proprietor, and of the number and amount of his shares: Held, that in order to shew proprietorship under the last-mentioned enactment, it is incumbent on the company to produce, as well the book required to be kept by the first, as that required to be kept by the second, of the above clauses: but that, provided the name and addition of the defendant are properly de-

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scribed, it will be no objection to the sufficiency of the evidence, that the additions of other proprietors are omitted. *London & Brighton Railway Company v. Fairclough.* Page 674

5. Where a clause in an act empowering directors of a railway company to make calls requires twenty-one days' notice to be given of every call, by advertisement, and directs that moneys so called for shall be paid to such persons, and at such times and places, as in such notice shall be appointed; and the act directs that at the trial of any action for a call, it shall only be necessary to prove that the defendant was a proprietor of such share or shares in the undertaking as such action is brought in respect of, or some one such share, and that such notice was given, as directed by the act, of such call having been made, without proving the appointment of the directors, or any other matter; it is sufficient to state the place and the time of payment in the advertisement, without noticing either in the resolution for making the call, such statement being made with the previous or subsequent assent of the directors; which assent will be presumed. *Ibid.*

6. A railway act makes the shares transferable by deed, and directs that on every sale, the deed being executed by the seller and the purchaser, shall be kept by the company, or by the secretary or

clerk of the company, who shall enter, in some book to be kept for that purpose, a memorial of such transfer and sale, and indorse the entry of such memorial on the deed of sale or transfer; and that, until such memorial shall have been made and entered, the seller shall remain liable for all future calls, and the purchaser shall have no part or share in the profits: Held, that in order to shew a party sued for calls, to be a proprietor under such a deed of transfer, it is not necessary to prove that a memorial of the transfer has been entered. *London and Brighton Railway Company v. Fairclough.* Page 674

7. The deed of transfer was executed by *A.* the seller, with the name of *B.* inserted as the purchaser; before any execution of the deed by *B.*, it was arranged that *C.* instead of *B.* should be the purchaser; whereupon, the name of *B.* being struck out and that of *C.* substituted, *A.* re-executed the altered deed: Held, that the deed was so far complete as between *A.* and *B.* that it could not operate as a conveyance to *C.* without a new stamp. *Ibid.*
8. *Quære*, whether it might have been shewn that *B.*'s name had been inserted *by mistake.* *Ibid.*
9. A railway act authorises the directors to sue for calls, or to declare the shares belonging to any person or corporation refusing or neglecting to pay to be forfeited, and to order the same to be sold; provided nevertheless,

that no advantage shall be taken of any forfeiture of shares until notice in writing given, nor until the declaration of forfeiture shall have been confirmed at a general or special general meeting of the company; after which requisites have been complied with, the company are authorised to sell the shares so forfeited. It was admitted, that a declaration of forfeiture by the directors, with such notice in writing, is, without such confirmation, no defence to an action for calls. *London and Brighton Railway Company v. Fairclough.* Page 674

10. A railway act authorises the company of proprietors to recover, in an action of debt, what shall be due for calls, *including interest on such calls.* It was admitted that interest was recoverable under a count for calls (the damages laid being sufficient to cover the amount) without a count for interest. *Ibid.*
11. A railway act requires that the proceedings of all meetings shall be entered in some book, and signed by the chairman of such respective meetings. Signature at a subsequent meeting, — at which the minutes of the former were read over and confirmed, — by a person who was chairman at both meetings, was admitted to be sufficient. *Ibid.*

COMPOSITION DEED

See CONDITION, I. 3.

Effect of execution of, where amount of debt left in blank. 673, (b).

CONDITION

See ASSUMPSIT, 4.

BOND, 4.

I. *Precedent or subsequent.*

Page 191, n.

And see PLEADING, I. ii. 4.; IV. 1.

SHIP, 5.

1. Generally. 592, (a).

2. Distinction as to conditions, in deeds and wills. 17, n.

3. An agreement, whereby a debtor undertook to convey his property to trustees for the benefit of his creditors, contained a proviso that "the said agreement was to be void unless the creditors, whose names and descriptions were stated on the other side of the agreement, should concur in the arrangement:"

Held, that this was not a condition precedent, the performance of which the debtor was bound to aver on setting up the agreement as an answer to an action by one of his creditors. *Mathews v. Taylor.* 667

4. In a correspondence in which it is proposed to the defendant to go out as surgeon to the plaintiff's emigrant ship, it is stated that the ship belongs to a certain class, and that the appointment must be subject to the approval of certain commissioners. The proposal is accepted.

Neither the quality of the ship nor the approval of the commissioners is a condition precedent to the obligation to go out as surgeon. *Richards v. Hayward.*

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5. A representation that a ship "will carry emigrant labourers not over forty," is satisfied if no more than forty labouring men are taken, although with their wives and children that number is exceeded. *Richards v. Hayward.*

Page 574

6. A negotiation respecting an appointment as surgeon to a ship was held, under the circumstances, to have terminated in a complete contract. *Ibid.*

CONSENT

See BILLS AND NOTES, I. 3

CONSIDERATION

See AGREEMENT, I.

BILLS AND NOTES, II. 2, 3.
PLEADING, I. iv.

CONSTRUCTION

I. *Of Agreements.*

See AGREEMENT, II.

CONTRACT,

II. *Of Covenants.*

See COVENANT.

III. *Of Statutes.*

See STATUTE.

CONSUL

See ACKNOWLEDGMENT.

CONTINUANCE

I. *Entry of,*

Not necessary in action against member of parliament, since the 12 & 13 W. 3. c. 3. 444, (b).

CONTRACT

See ACCOMMODATION BILL,
AGREEMENT,

3 s 2

DEBT

See CAPIAS AD RESPONDENDUM,
COUNTY COURT,
INSOLVENT,
PLEADING,
PRACTICE,
SURETY.

DECK-CARGO

See SHIPPING.

French law relating to, Page 225, n.

DECEIT

I. *Where actionable.*

And see FALSE REPRESENTATION.

1. The declaration, after stating that the plaintiffs prepared, vended, and sold, for profit, a certain medicine called "*Morison's Universal Medicine*," which they were accustomed to sell in boxes wrapped up in paper, which had those words printed thereon, alleged that the defendant, intending to injure the plaintiffs in the sale of their said medicines, deceitfully and fraudulently prepared medicines in imitation of the medicines so prepared by the plaintiffs, and wrapped up the same in paper, with the words "*Morison's Universal Medicine*" printed thereon, in order to denote that such medicine was the genuine medicine prepared and sold by the plaintiffs; and that the defendant, deceitfully and fraudulently, vended and sold, for his own lucre and gain, the last-mentioned boxes of the said articles, represented by him to be medicines by the name

DEFENCE.

and description of "*Morison's Universal Medicine*," which had been prepared and sold by the plaintiffs; whereas, in truth, the plaintiffs had not been the preparers, &c. thereof.

Held, on a motion to arrest the judgment, that the declaration disclosed a sufficient cause of action. *Morison v. Salmon*. Page 385

DEDUCTIONS

See SET-OFF.

DEED

See ASSUMPSIT, 3.

COMPANY, 3. 6.

COVENANT,

GIFTS,

STAMP.

1. Effect of cancellation of, 665, (a).
2. Delivery of, as an escrow. 692, b).
3. Contract by, cannot be varied by parol; but the defendant may show that the plaintiff prevented the performance of the contract. 745, (b).

DEFAMATION

See SLANDER.

DEFECTS

See ALDER.

DEFENCE

1. Parties, why precluded from using more than one defence at common law. 643, (a).

DE INJURIA

See **BILLS AND NOTES**, 2.

PLEADING.

In covenant. Page 736, (a).

DELEGATION OF
AUTHORITY.

See **ARBITRAMENT**, 6.

DELIVERY

I. *Of Bill of Costs.*

See **ATTORNEY**, II. 1, 2.

II. *Of Deed.*

See **BOND**,

DEED, 2.

III. *Of Goods sold.*

See **CONTRACT**,

VENDOR AND PURCHASER.

1. What required by civil law, of bulky article. 653, (a).

2. *Risk* in goods sold, previous to, 654, (d).

IV. *Of Gifts.*

1. Necessary, to perfect donations *mortis causa*, 691, (a).

2. Not necessary, to perfect donations *inter vivos*, *Ibid.*

DEMURRER

See **BANKING COMPANY**, 1.

PLEADING.

DEVISE

I. *Estate of Devisee.*

1. *A.* by his will, after bequeathing certain pecuniary legacies to *C.* and *D.*, his son and daughter by a second marriage, and 100*l.* to his granddaughter *E.*, declared, "But if it should happen that my son *B.* should marry and have heirs of his own, then my will is,

that my executors shall pay unto *E.* the further sum of 100*l.* in addition to the 100*l.* before bequeathed to her, to be paid within twelve months after the birth of *B.*'s first child." And after giving certain specific legacies to *C.* and *D.*, he proceeded as follows: — "In case it should happen that *B.* (*A.*'s eldest son and heir at law), should depart this life and having no heirs lawfully begotten, and that my freehold tenement situate, &c. should fall by descent unto *E.*, and she inherit and possess the same; then my will is, that *E.* shall pay out of my said freehold tenement the sum of 400*l.* viz., 200*l.* to *C.*, and 200*l.* to *D.*, the same to be paid within twelve months after *E.* comes into possession of the said estate;" adding a power of entry and sale in case of non-payment of the 400*l.* :

Held, first, that the words "in case it should happen that my son *B.* should depart this life and having no heirs lawfully begotten, and that my freehold tenement should fall by descent unto *E.*," contemplated an indefinite failure of issue, from which an estate tail in *B.* might be implied.

But held, secondly, that the will contained no devise over to *E.* express or to be implied, so as to cut down the estate taken by *B.*, the heir at law, to an estate tail with remainder to *E.* in fee, though there were strong grounds for conjecturing that the testator intended *E.* to succeed to the estate

in case his heir *B.* should die without issue. *Doe dem. Cape v. Walker.* Page 113

2. In order to cut down the interest of *B.*, the heir to an estate tail, an *express* devise over is unnecessary, if the intention of the testator that the estate should go over in case *B.*, the heir, died without issue is clearly manifested by the will. *Ibid.*

3. A testator devised his freehold, duchy or copyhold (*i. e.* conventional, *see* CONVENTIONARY TENURE), and leasehold estates to his widow and his youngest son, upon trust to permit his widow to receive the rents and profits for life, should she remain unmarried, and from and after the decease or future marriage of his widow, then as to all his freehold and duchy or copyhold and leasehold estates, to the use of his three sons, to be equally divided between them as tenants in common for ever; and he declared his further will to be, that if, at any time within three years next after the decease or future marriage of his widow, his eldest son *Hugh* should be desirous to have the whole of the estates before devised unto and among him and his brothers, upon his paying 1000*l.* to each of them within that period for such their shares and interest therein, the same should become the sole and exclusive property of such eldest son. And after giving certain legacies to the testator's daughters, which, with debts, were

charged upon his freehold property in the event of the personality being insufficient, the will proceeded: — "I further direct that should my eldest son die without issue, then I give and devise unto my second son *John Morgan* all those my freehold and duchy or copyhold estates aforesaid; and in case he should have no issue, then to my youngest son *Edwin* and his issue, his heirs, and assigns for ever."

The eldest son died intestate and without issue, leaving his mother, still unmarried, and his two brothers, him surviving, and without having exercised the option of purchase given him by the will:

Held, that the eldest son died seised of the remainder in fee of one third part of the freehold and duchy or copyhold lands devised by the testator's will, expectant on the death or second marriage of his mother; and that he died possessed of the absolute estate in remainder in one third part of the leasehold estates devised by the said will, expectant on the death or second marriage of his mother. *Ley v. Ley.* Page 780

4. *A.*, on the 11th of *May*, 1811, devised lands to *B.* and *C.*, upon trust, that they, *and their heirs*, should let the lands, and out of the rents thereof should, in the first place, pay 12*l.* 10*s.* 6*d.* which *A.* owed to *D.*; and in the next place, should pay to *E.*, *F.*, *G.*, *H.*, and *I.*, 10*l.* a-piece, *as soon as the clear rents and profits of the*

DISCLAIMER.

*lands would admit ; and from and after the said debt and legacies (amounting in the whole to 171*l.* 10*s.* 6*d.*) should be paid and discharged, A. devised the lands to Z., in fee. A. died on the 20th of May 1811. At the time of A.'s death, the lands were let to K. for 30*l.* a year, under a lease for twenty-one years from the 25th of March 1808. The trusts of the will were satisfied, and the said debt and legacies paid by B. and C., without any other letting of the lands :*

Held : that, as no greater estate was required to perform the trusts of the will, &c., B. and C. took only a chattel interest in the lands. Ackland v. Pring. Page 937

DILAPIDATION

See LANDLORD AND TENANT.

DISABILITY

See LIMITATIONS, STATUTE OF

DISCHARGE

See INSOLVENT.

DISCLAIMER

*See CONVEYANCE,
GIFTS,
REPLEVIN,
USE.*

1. When it may be by parol. *701, (a).*
2. When it must be in a court of record. *Ibid.*
3. By deed, why introduced, and under what misapprehension upheld. *Ibid.*

EJECTMENT.

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DISCOUNT

See BILLS AND NOTES, II. 4.

DISTRINGAS

See PRACTICE.

DONATIO MORTIS CAUSA

See GIFTS.

DRAFT

See ASSUMPSIT, 1.

DRAINS

See STATUTE, 4.

DUCHY (OF CORNWALL) LANDS

See 781, (a).

ECCLESIASTICAL BENEFICES

See CHURCH.

EJECTMENT.

Service of Declaration.

1. An acknowledgment by the tenant in possession, *on the first day of term*, that the declaration (which had been served by delivering a copy to a servant upon the premises) had come to his hands before the term, is sufficient, on a motion for judgment against the casual ejector. *Doe dem. Figgins v. Roe. Page 294*

Particulars of Breaches.

2. Where, in ejectment by landlord against tenant, particulars of breaches of covenant are delivered,—for selling hay and

straw off the land, removing manure, and *non-cultivation*,—evidence of a breach of covenant by mismanagement in over-cropping, or by deviating from the usual rotation of crops, is inadmissible. *Doe dem. Winnall v. Broad.* Page 523

ELECTION

See AGENT,
PRACTICE.

ENDOWMENT

See CHURCH.

ENLARGEMENT OF TIME

See ARBITRAMENT, 14, 15.

ENTRY OF APPEARANCE,

See 315, (a).

ENTRY OF JUDGMENT

See PRACTICE.

1. When allegation of, unnecessary. 734, (d).
2. When traverse of, bad. 929, (b.)

ERECTIONS

See LANDLORD AND TENANT.

ERROR

See AMENDMENT, II.

1. Whether defendant can bring, where of two issues upon pleas in bar of action, one is found for plaintiff and the other for defendant. 324, n.
2. Whether plaintiff can bring, where two issues in bar of action, one in law and the other in fact, and judgment for the plaintiff on the issue in law. *Ibid.*

EVIDENCE.

3. Substituted for motion for judgment *non obstante veredicto*.

Page 404, n.

ESCAPE

See PLEADING.

ESCROW, See Page 692.

ESTATE

I. *Freehold for life.*

See INTEREST.

Interest in land, of uncertain duration, constitutes freehold for life.

19 n.

II. *Tail.*

See DEVISE,
FREE-TAIL.

ETCHINGS

See PLEADING.

EVIDENCE

See ACCOUNT STATED,
AGENT, I. 3. ; II. 4.
ARBITRAMENT, 19.
BILLS AND NOTES,
COMPANY,
FALSE IMPRISONMENT,
MISDIRECTION,
USE AND OCCUPATION.

- I. *Admissibility of statements made by a party, favourable to himself.*
1. In an action by A. against B., C., and D. for false representations alleged to have been made by them, acting as directors of a joint stock company, conversations between B. and C., and conversations between C. and E., a former agent of the company, are

admissible in evidence to shew the *bona fides* of the defendants in making such representations. *Shrewsbury v. Blount*. Page 475

2. Books in the hand-writing of *E.*, sent by him after he had ceased to be such agent, to the secretary of the company, are not admissible in evidence for the plaintiff, unless it be shewn that the books were kept by *E.* as agent. *Ibid.*

II. *Admissibility of parol evidence to explain written contract.*

In an action for the non-delivery of hops, sold under the following contract: — “Of *E. Y.* thirty-nine pockets *Sussex* hops, *Springett's*, five pockets, *Kenward's*, 78s. *Springett's* to wait orders:”

Held, that the contract imported a sale for ready money; and that parol evidence was not admissible to show, that, by the usual course of dealing between the parties, the hops were sold on a credit of six months. *Ford v. Yates*. 549

III. *Admissions in pleadings.*

Where a declaration contains two inconsistent counts, and the defendant pays money into court upon the second count, which the plaintiff accepts, the defendant cannot read the second count and the proceedings thereon to the jury, as conclusive, or as any evidence to negative an allegation in the first count. *Gould v. Oliver*.

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EXCEPTION.

See STATUTE, 2.

EXCHEQUER, COURT OF,
Converted into court of common law within legal memory. Page 467, n.

EXECUTION

See BANKING COMPANY, 1. 3.
COMPANY,
SHERIFF.

EXECUTORS AND ADMINISTRATORS

See COVENANT,
DEVISE,
GOODS SOLD,
PLEADING,
PRACTICE.

1. Whether a fee or chattel interest taken under a devise to them.

954, (b).

2. In covenant against an executor, for a breach of one of the covenants in an indenture of lease, the declaration alleged, that on the death of the lessee all his estate and interest came to and vested in the defendant; by reason whereof, the defendant, as executor as aforesaid, became and was possessed, &c.

Held: a sufficient averment that the term vested in the defendant as executor.

Held, also: that it was unnecessary to aver that the term had vested in the defendant as executor; as the vesting of a term in the personal representatives, together with their liability to be sued upon the covenants of the lessee, is a conclusion of law. *Ackland v. Pring*. 937

986 FALSE IMPRISONMENT.

EXIGENT

When it will lie against a peer.

Page 452, (a).

EXPORTATION

See STATUTE, 2.

Meaning of term.

155, n.

EXPROMISSIO

See ADPROMISSIO.

FALSE IMPRISONMENT.

1. In an action against the governor of *Gibraltar*, for assault and false imprisonment, it was proved that a party of soldiers, under the command of his military secretary, surrounded the plaintiff's house, and that while a search was making in the adjoining house, for a *Spaniard* who was suspected to be concealed there, the plaintiff, in attempting to leave his house, was prevented from so doing by a sentinel placed at the door, who compelled him to return.

It was also proved that the defendant had repeatedly expressed a desire to apprehend the *Spaniard*; that his secretary, being unattached could not employ the troops on such a service except by his directions, and that the defendant had never called his secretary to account for what had occurred. It further appeared, on the evidence of the plaintiff's brother, that the plaintiff had told

FALSE REPRESENTATION

him, that the defendant expressed to the plaintiff his regret at having been obliged to direct the search. No evidence was given on the part of the defendant.

The jury having returned the verdict for the plaintiff; it was held, that they were warranted in coming to the conclusion that the defendant had ordered the search, and that the act complained of was a necessary consequence of the defendant's orders. *Glynn v. Houston*.

Page 337

2. The plaintiff's brother (who was examined on interrogatories), having being asked, upon cross-examination, as to some particulars of a conversation which, the plaintiff had told him, he, the plaintiff, had held with the defendant, and being asked, on re-examination, to detail the whole conversation, stated that the plaintiff had informed him that the defendant had expressed his regret at being obliged to direct the search. Held: that this evidence was admissible. *Ibid*.

FALSE REPRESENTATION.

See EVIDENCE, 1.

An action does not lie for a false representation whereby the plaintiff, being induced to purchase the subject matter of the representation from a third party, has sustained damage,—the representations appearing to have been made *bonâ fide* under a reasonable and well grounded belief that the same were true. *Shrewsbury v. Blount*.

FORFEITURE.

FARM
See AGENT, I.

FEEES
See ARBITRAMENT, 16.

FEE FARM RENT
Distinguished from rent charge.
Page 713, (a).

FEME COVERT.
See ACKNOWLEDGMENT,
BOND,
HUSBAND AND WIFE.

FIAT
See ATTORNEY, II. 2.

FICTIONS OF LAW
Resorted to in order to give jurisdiction to the courts. 466, n.

FIERI FACIAS
See SHERIFF,
Seizure of stranger's goods under, may be abandoned, and *ca. sa.* issued without return to *fi. fa.* 914, (c).

FINALITY OF AWARD
See ARBITRAMENT, 18.

FIRE
Liability at common law for damage occasioned by, 746, (c).

FIXTURES
See LANDLORD AND TENANT,
Foreign law relating to 757, (a).

FORFEITURE
See COMPANY,
LANDLORD AND TENANT, 1.

GOVERNOR. 987

FRAUD
See PLEADING.

FRAUDS, STATUTE OF
See AGREEMENT,
ASSIGNMENT, 4.

FRAUDULENT CONVEYANCE
See BANKRUPT.

GAOLER
See PLEADING.

GIBRALTAR
See FALSE IMPRISONMENT, 1.

GIFTS
I. *Inter vivos.*
By *parol*, revocable by donor before acceptance by donee.
Page 691, (a).
By *deed*, irrevocable by donor. *Ibid.*
May be disclaimed by donee. *Ibid.*
Property vests in donee without delivery. *Ibid.*
II. *Mortis causâ.*
Property does not vest without delivery. *Ibid.*

GOODS SOLD AND DELIVERED.
Contract entered into with a tailor, for goods to be made up, partly performed by him, but completed after his death, by his personal representative, *quære*, if not to be declared on specially. 857, (a).

GOVERNOR
See FALSE IMPRISONMENT, 1.

GREENHOUSE

See LANDLORD AND TENANT.

GUARANTEE

See LIMITATIONS, STATUTE OF,
TROVER.

1. A declaration stating "that in consideration that *A.* had, at the request of *B.*, advanced 24*l.* to *C.*, and that *A.* would advance to *C.* the further sum of 2*l.* per week for so long a period as *C.* should require, and also such other sums of money as *C.* should, from time to time, require, *B.* promised to repay him as well the 24*l.*, as the further sums of 2*l.* per week, and such other sums as *A.* should lend and advance to *C.* as aforesaid," is not supported by a letter in which *B.* writes to *A.*, "I beg that you will continue to advance the sum of 2*l.* per week to *C.*; and I hereby engage to repay you all moneys you may advance to him, in addition to the 24*l.* which you have already let him have at my request." *Smith v. Brandram.*

Page 244

2. But the variance may be amended by the judge at the trial, under 9 G. 4. c. 15., if not under 3 & 4 W. 4. c. 42. s. 23. *Ibid.*
3. Where, upon such an amendment being made, the defendant submits to pay the sums recoverable under the amended declaration, he will be entitled to his costs from the time at which he might have paid money into court; but if he contests the plaintiff's right to recover

INDENTURE.

any thing, and fails, he will be entitled only to the costs occasioned by the misdescription of the contract. *Smith v. Brandram.*

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HOLDER

See BILLS AND NOTES.

HOLLAND

See INSURANCE.

HOMINE REPLEGIANDO

When it will lie against a peer.

451, (c).

HUSBAND AND WIFE

See ACKNOWLEDGMENT.

I. Agency of wife.

1. To a count for work done and attendance given by *A.*, then and still the wife of the plaintiff, for the defendants, and at their request, the defendants pleaded payments made from time to time to the wife, and acceptance by her in satisfaction of the cause of action and damages: Held bad, for not averring that the wife was authorised by the plaintiff to receive payment. *Offley v. Clay.*

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IMPERTINENCE

See PRACTICE.

INDEMNITY

See AGREEMENT.

INDENTURE

See COUNTERPART.

INDORSER

See **BILLS AND NOTES,**
INDORSEMENT.

INDORSEMENT

- I. *On record.* See **SLANDER.**
- II. *Of bill of exchange.*
 1. In blank, effect of, Page 723, (a).
 2. By procuration, effect of, 724, (b).

INDUCEMENT

1. Special, to traverse, if bad, makes whole pleading demurrable.
672, (a).

INFERENCE

See **ARBITRAMENT, 19.**
BILLS AND NOTES.

INROLMENT

See **ACKNOWLEDGMENT.**

INSOLVENT

1. *B. gives to A. a bill of exchange drawn by C. and accepted by B., for 42l., owing from B. to A. B. obtains his discharge under the insolvent debtor's act. A. sues C., and takes him in execution. To obtain C.'s discharge, B. gives A. a warrant of attorney for 52l. 11s. 3d., made up of the debt and costs, recovered against C., and A.'s costs of opposing B.'s discharge.*

The warrant of attorney is available for the costs of the action against C., and for the costs of opposing B.'s discharge, but not for the amount of the debt on the bill recovered against C. *Collins v. Benton.*

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INSPECTION OF DOCUMENTS

See **PRACTICE.**

INSURANCE

- I. *What amounts to a total loss.*
 1. A *Dutch* ship, valued in the policy at 8000l., was insured on a voyage from *Rotterdam* to *Java* and *Sumatra*, and back again to a port of discharge in *Holland*.

After commencing her voyage she was stranded on the *Goodwin Sands* and plundered. She was ultimately removed to *London*, and notice of abandonment was given to the underwriters. It was proved that, at the time she was cast away, she was worth 5833l., that her value as she lay was 700l., and that the salvage was 420l. It also appeared in evidence, that the expense of repairing the ship in *England* would have been 4615l.; that if she had been entitled to an *English* register she would have been worth, when repaired, from 4500l. to 4700l.; and that, if she had been a *British* ship, it would have been prudent for a *British* owner to repair her. It was proved by *Dutch* witnesses that the expense of repairing her in *Holland* would have been far greater, and that her value, when repaired in *Holland*, would not have exceeded 2915l.; and that the trading companies in *Holland* will not employ a vessel that has been stranded in the manner in which this vessel was stranded, however perfectly she might have been repaired, and that this cir-

cumstance would have affected her value in *Holland*.

The judge told the jury, that in considering whether this was the case of a partial or a total loss, they ought not to take into account the value stated in the policy, and that, in considering the same question, they ought to look at all the circumstances attending the ship, and to judge whether, under all those circumstances, a prudent owner, if uninsured, would have declined to repair the ship; and that, if so, they might find it a case of total loss:

Held, that this direction was right. *Young v. Turing*. Page 593
II. *Valued policy*, *vide supra*.

INTEREST

See ARBITRAMENT, 4.

DEVISE,
ESTATE,
WITNESS.

INTERPLEADER

See BANKRUPT.

1. An issue was directed under the interpleader act, between *A.*, the claimant, and *B.*, the execution creditor, to try whether five horses, or any of them, were the property of *A.* The jury found that two horses only belonged to *A.* *A.* obtained a rule nisi for payment to him of the general costs of the issue, the costs of the application under the interpleader act, and the costs of the rule. The court gave neither party the general costs of the issue nor the

costs of the rule, but gave to each such portion of the costs as applied to the part on which he had succeeded, and allowed *A.* his costs of the application under the interpleader act. *Lewis v. Holding*.
Page 75

IRREGULARITY

See BANKING COMPANY, 1.
PRACTICE.

ISSUE

See AGREEMENT,
DEVISE.

JOINT STOCK COMPANY

See COMPANY.

JUDGE'S ORDER

See ASSUMPSIT, 4.
PLEADING.

JUDGMENT

See BANKING COMPANY, 1. 3, 4.
PRACTICE.

I. *After verdict*.

1. Where two issues, one found for plaintiff and the other for defendant. 324, n.

2. Where issue in law is found for defendant. *Ibid*.

3. Entry of. See PRACTICE,

II. *Non obstante veredicto*. See ERROR, LANDLORD.

When it can be entered. 508, (a).

III. *As in case of a nonsuit*. See PRACTICE.

JURISDICTION

See ACCOUNT, ACTION OF,
ARBITRAMENT,
CHANCERY,
COMMON PLEAS,
COUNTY COURT,
EXCHEQUER,
KING'S BENCH,
LORDS, HOUSE OF,
PRACTICE.

JUS TERTII

See BANKRUPT.

KING

No constituent part of the parliament.
Page 457, n.

KING'S BENCH, COURT OF

Civil jurisdiction of, created within legal memory. 567, n.

KNOWLEDGE

See AGENT, I. 3.

LANDLORD AND TENANT

See ALIENATION,
EJECTMENT.

I. Rights of, as against tenant.

1. In covenant, the declaration stated, that the plaintiffs and *A. B.*, since deceased, being possessed of a certain house for the residue of a certain term of ninety-four years wanting twenty days, demised the

same to the defendants for twenty-one years, at a certain rent, by an indenture containing a covenant to repair, and alleged a breach of that covenant; by means whereof all the estate and interest of the plaintiffs and *A. B.* in the house became and was forfeited, and the same reverted to *C. D.*, who thereupon availed himself of the forfeiture, and brought an ejectment, in which he recovered judgment, and obtained possession of the house; by means of which premises the plaintiffs since the death of *B.* had lost the rents covenanted to be paid by the defendants, &c.

The plea traversed the alleged breach of the covenant to repair; on which issue was joined.

At the trial the plaintiffs claimed damages for the loss of their term, and for the amount of dilapidations, in the house demised to the defendants. It appeared by the particulars delivered in the ejectment brought by *C. D.*, that such ejectment was founded upon the breach of certain covenants contained in a superior lease granted by *C. D.* for ninety-nine years, and that the breaches of covenant relied on were, the non-repair of various houses, including the house in question (which was shewn to be out of repair), and for the breach of a covenant which was not contained in the lease to the defendants:

Held, first, that inasmuch as it did not appear that *C. D.* might

not have recovered possession of the property for a breach of the covenant not contained in the lease to the defendants, the plaintiffs were not entitled to recover the value of their term from the defendants:

Secondly, that they were entitled to recover the amount of the dilapidations in the house in question at the time the ejectment was brought for the forfeiture. *Clow v. Brogden.* Page 39.

2. A covenant, to yield up at the expiration of the term all erections and improvements erected, made, or set up during the term, is broken by the removal of the sashes and framework of a greenhouse erected during the term, the framework of which was laid upon the walls built for the purpose of receiving it, and embedded in mortar thereon. *West v. Blakeway.* 729

3. A plea to such a breach, that it was agreed between the lessor and the termor, and that the lessor promised the termor, that if the latter would erect, make, and set up a certain erection and improvement, to wit, a greenhouse in and upon the premises during the continuance of the term, he, the termor, should be at liberty to pull down and remove such greenhouse at the expiration of the term, provided no injury were done to the premises, that the termor confiding in the agreement and promise did erect &c., and did at the expiration of the term remove such greenhouse, and that no in-

LIMITATIONS.

jury or damage was done to the premises, was held to be a bad plea, upon which the plaintiff was entitled to judgment *non obstante veredicto.* Page 729

LAND-TAX

See COVENANT.

LEASE

See LANDLORD AND TENANT.

LEGACY

See PLEADING.

LEGAL MEMORY

See MEMORY.

LESSOR

See ALIENATION,
LANDLORD AND TENANT.

LETTER

See AGREEMENT, I. III.

LIABILITY

Of Agent.

See AGENT, II., 2, 3.

LICENCE

See ALIENATION.

1. When revocable. 658, (a).
2. When to be pleaded as a lease. *Ibid.*

LIMITATIONS, STATUTE OF,

1. Statutory period once beginning to run, not stopped by subsequent disability. 444, (a).
2. How affected by parliamentary privilege. *Ibid.*, 459, (a).
3. Contract to guarantee debt barred by, how far binding. 647, (a).

MAXIMS.

LIVERY OF SEISIN

1. When implied. Page 422, (a).

LOAN

See PRINCIPAL AND SURETY.

LONDON

See STATUTE, 2.

LORDS, HOUSE OF.

1. Appellate equitable jurisdiction of, created in the reign of *Jac. I.* 466, n.

LOSS

See INSURANCE.

1. Total or partial. 593

MAKER

See BILLS AND NOTES.

MANOR

1. By whom may now be created. 713, (a).
2. Assessionable. See CALSTOCK, MORESK.

MANUFACTURER

See WARRANTY.

MARLEBRIDGE, STATUTE OF 464, (a).

MASTER AND SERVANT

See PLEADING.

MAXIMS.

1. *Ex turpi causâ non oritur actio.* 390, (a).
2. *Exceptio probat regulam, de non exceptis.* 465, (c).

MISTAKE.

993

3. *Nemo prohibetur pluribus defensionibus uti.* Page 643, (a).

MEMORANDUM OF CHARTER

See CHARTER PARTY,
SHIPPING.

MEMORIAL

See COMPANY.

MEMORY (LEGAL)

1. *Origin of period of.*
1. Why fixed at time of coronation of Richard I. 467, n.

MERTON, STATUTE OF 468, n.

MESNE SEIGNIORY, 843, (a).

MISCONDUCT

See ARBITRAMENT, 9, 10, 11, 12, 13.
BOND.

MISDIRECTION

See NEW TRIAL.

1. It is no misdirection if the judge states in strong terms the impression which the evidence has made upon his mind, unless it be clearly shewn that the impression was not warranted by such evidence. *Davidson v. Stanley.* 721

MISNOMER

1. Effect of, 327, (a).

MISREPRESENTATION

See DECEIT.

MISTAKE

See ARBITRAMENT, 9, 12, 13.

MONEY

1. Effect of deposit of, as to change property. Page 70, n.

MONEY HAD AND RECEIVED.

See ARBITRAMENT, 16.

MORESK

Assessionable manor of, 791, (a).

MOTION

See BANKING COMPANY, 1.

MUNICIPAL CORPORATION ACT

See CHURCH.

NEGOTIATION.

See BILLS AND NOTES.

NEW ASSIGNMENT

1. Admissibility of. 927, (a).
2. When a departure. 927, (b).

NEW TRIAL

See PRACTICE,
VENIRE DE NOVO.

1. Where there is no affidavit shewing misdirection, in the case of a trial before the sheriff, the court will presume that the sheriff properly directed the jury. *Mayletts v. Cowley.* 363
2. *Semble*, that a rule nisi for a new trial, obtained on the ground of a misdirection in a case tried before the sheriff, may be answered by an affidavit showing in what

NOTICE.

manner the case was left to the jury. *Mayletts v. Cowley.*

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NOLLE PROSEQUI

1. To the whole action, effect of, 712, (a).

NOMINATION

See CHURCH.

NON ACCEPTAVIT

See BILLS AND NOTES.

1. Effect of plea of, 909, (a).

NON ASSUMPSIT

See ASSUMPSIT, 2, 3.
PLEADING, I. i.

NON CEPIT

1. When pleadable. 13, n.

NON-CULTIVATION

See EJECTMENT.

NON EST INVENTUS

1. Meaning of term. 439, (c).

NON INFREGIT CONVENTIONEM, 741, (a).

NON-JOINDER

See BANKING COMPANY, 1, 2.

NONSUIT

See PRACTICE.

NOTE

See BILLS AND NOTES.

NOTICE

See COMPANY.

- I. To determine contract.

See PLEADING.

II. *Of declaration.**See PRACTICE.*

NUNQUAM INDEBITATUS

See SET-OFF.

OATH

See ACKNOWLEDGMENT.

OBLIGEE

See BOND.

OCCUPATION

See AGREEMENT, II.

Permissive. Page 843, (a).

OFFICER, PUBLIC

See BANKING COMPANY, 1, 3. 4.

ORIGINAL WRIT.

Alteration of practice by, 779, (b).

OUTLAWRY

See PARLIAMENT.

1. Revocation of, for fraudulent return. 440, (a).
2. Whether it lies against member of parliament.* 452, (b).

OYER

1. An instrument set out upon oyer must be read as part of the declaration (or other pleading) in which profert has been of such instrument. *Ashton v. Freestun.* 1
2. Effect of setting out instrument. 3, n.

* Trespass against the Prior of St. John, &c. And the writ was challenged because he was not named by his name of baptism, THOMAS. It is not necessary; for an abbot or prior shall not be outlawed. Wherefore he pleaded, not guilty. *Fitz. Brief.* pl. 507. P. 39. E. 3. fo. 13.

PARLIAMENT

I. *How constituted.*

1. The three estates of. Page 456, n.
2. The king no part of. 457, n.
3. As to the houses sitting together. 472 (e).

II. *How assembled.*

1. Members punishable for not attending according to summons. 543, (b).

2. Members cannot absent themselves without leave. 447, (a).

- III. *Members, how suable.* 448, (a). 453, (a).

See PRIVILEGE.

1. Whether outlawry lies against.* 452, (b).
2. A *capias ad satisfaciendum* issued against a member of parliament in an action of assumpsit is irregular, although delivered to the sheriff with direction to be returned "*non est inventus*," in order to ground proceedings to outlawry. *Cassidy v. Steuart.* 437

PAROL AGREEMENT

See AGREEMENT, 3.

ASSIGNMENT, 3.

ASSUMPSIT, 3.

COVENANT,

LANDLORD AND TENANT,
PRACTICE.

PAROL EVIDENCE

*To explain written contract.**See EVIDENCE.*

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*Of breach of covenant, in ejectment.**See EJECTMENT.*

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1. Contracts of prior firm how far binding on successors. Page 199, n.
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HUSBAND AND WIFE,

PEACE

See CAPIAS AD RESPONDENDUM,

1. Distinction between liability for breach of the peace, and liability for surety of the peace. 461, (a).

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See OUTLAWRY,

PARLIAMENT,

1. Arrest of, 437 (a), 439 (b).
2. As to process against, in Chancery, 448, (b).
3. When *capias ad respondendum* lies not against, 451, (c).
4. When *capias ad satisfaciendum* lies against, 437, (a).
5. When *homine replegiando* lies against, 451, (c).
6. When *exigent* lies against, 452, (a).
7. When bailable, 465, (c).
8. When may be taken in execution. *Ibid.*
9. Punishable for not attending parliament according to summons. 453, (b).

PLEADING.

PAIS, MATTER IN

Distinction between, and matter of record. Page 751, (d).

PERFORMANCE

General averment of.

See PLEADING.

PETITIONING CREDITOR'S DEBT.

See WARRANT OF ATTORNEY.

PLEA

See ASSUMPSIT,

BANKING COMPANY.

In abatement or in bar. 440, (b).

PLEADING

See AGREEMENT,

ARBITRAMENT, 20.

ARREST OF JUDGMENT,

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BANKING COMPANY,

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COMPANY.

DECEIT.

DEVISE.

INDUCEMENT.

I. *In Assumpsit.*

i. *Declaration.*

See *Plea (infra ii.)*

1. The declaration stated, that therefore, *to wit*, on the 31st of May 1825, by an agreement in writing, the defendant's testator agreed within two years from *Midsummer then next*, to build certain houses; and alleged for breach, that the houses at the commencement of the action (1839) were unbuilt, contrary to the agreement: Held bad on ge-

neral demurrer, for not shewing that two years from *Midsummer* next after the making of the agreement had elapsed previous to the commencement of the suit.

Parkinson v. Whitehead. Page 329

ii. *Plea.*

See ASSUMPSIT, 2.

1. The declaration set out a contract, whereby the plaintiff agreed to employ the defendant in his service, and the defendant agreed to serve the plaintiff in his business *for one month certain, and until the expiration of a month's notice, to be given by either party.* In consideration whereof the defendant did thereby agree, that he would not, during the continuance of such service, or within the space of twenty-four months *after quitting or being discharged from the same,* commence, &c. the business of a cowkeeper within five miles from *Northampton Square,* in the county of *Middlesex;* and if at any time during such service, or within twenty-four months *after the determination thereof,* the defendant should commence, &c. such business, that he would pay 10s. for every day that he should act contrary to the agreement. The declaration then averred, that the defendant entered into the plaintiff's service, and continued therein until, &c., when he *quitted and was discharged from the same;* and although the plaintiff had always performed and fulfilled the agreement in all things therein contained to be performed on his

part, yet the defendant did not perform the said agreement, &c., — stating the breach to be, that the defendant did commence, &c. such business within the specified time and space.

Plea, that the plaintiff did not give to the defendant, nor the defendant to the plaintiff, a month's notice in writing, to determine the contract and service, concluding with a verification.

On demurrer to this plea it was held bad. *Proctor v. Sargent.*

Page 20

2. Held also, that the general allegation of performance of the agreement by the plaintiff in the declaration was sufficient on general demurrer; and also, that if the defendant had been improperly discharged by the plaintiff, such wrongful discharge was no answer to the action, but would be merely the subject of a cross-action.

Ibid.

3. Held further, that the agreement was valid, being limited both in time and space, and not appearing to be an unreasonable restraint of trade.

Ibid.

4. Assumpsit on a banker's cheque for 250l. Plea, that before the making of the cheque, the defendant, as executor of one *R. S.,* was lawfully entitled to a bond for 500l., which bond was in the hands of the plaintiff, who refused to deliver up the same to the defendant; that the plaintiff and twelve others claimed to be entitled to legacies under the will of *R. S.,* and there-

upon it was agreed between the plaintiff and defendant, that the plaintiff should deliver up the bond to the defendant, and that the defendant should make and deliver to the plaintiff the cheque in question, which should be a security for the payment of the legacies, and that the plaintiff should receive the *said sum of money*, upon and subject to an express condition, that the legatees under *R. S.'s* will should authorise the plaintiff to receive the said sum; that the defendant made, and the plaintiff received the cheque upon that condition, and that the legatees had not authorised the plaintiff to receive the same sum :

Held, on special demurrer, assigning for cause—that it did not sufficiently appear by the plea, that the authority to be given by the legatees was a condition precedent to the payment of the cheque,—that the plea was a good answer to the action. *Spincer v. Spincer*. Page 295

5. Under an agreement to assign a lease, the defendant agreed to pay the rent and taxes to become due in respect of the premises after a certain day, and to indemnify the plaintiff against the rent and covenants contained in the lease, and from all loss which he might incur by the non-payment or non-observance of such rent or covenants.

No legal assignment was made, but the defendant was let into possession, and certain of the plaintiff's goods which had been left upon

the premises were distrained for the rent and taxes. In an action upon the agreement for not indemnifying, the declaration alleged, “that divers goods or chattels of the plaintiff were in and upon the demised premises *with the leave and licence of the defendant*, and were liable to be seized and taken, &c., and afterwards divers of the said goods were lawfully seized and taken as distresses for arrears of rent due under the said indenture in respect of the said demised premises, and sold, &c.”

The defendant pleaded that “no goods or chattels of the plaintiff were, at any time, in and upon the demised premises, with the leave and licence of the defendant, nor was any part of *such goods* lawfully seized or taken as and for a distress, or sold or disposed of as therein alleged : ”

Held, that the statement relating to the leave and licence was immaterial; and that the substance of the plea was, that the plaintiff's goods had not been seized; and that as the facts involved in the issue raised thereon, had been found for the plaintiff, the verdict upon such issue should have been entered for him. *Groom v. Bluck*. Page 567

iii. *Several Pleas.*

In assumpsit on an agreement to prepare and deliver within a certain time etchings of certain drawings, to be supplied by the plaintiff, an order was made at chambers allowing the defendant to

plead,—non assumpsit—that the plaintiff delivered to the defendant unfit and improper drawings—that the defendant was hindered, by the act of God and by illness, from preparing and delivering the etchings within the stipulated time—and a dispensation of the performance; but allowing him to plead one only, at his election, of the following pleas:—that the plaintiff did not supply the drawings within a reasonable time—and that the plaintiff delivered drawings unfit and improper for the purpose:

Held, that this was a proper order. *Griffith v. Roberts.*

Page 907

iv. *Replication.*

In assumpsit on a bill of exchange, by the last indorsee against an intermediate indorser, the defendant pleaded, that he was induced to indorse the bill by the fraud, covin and misrepresentation of the plaintiff and two others of the indorsers and other persons in collusion with them, and without any value or consideration. The plaintiff in his replication traversed the alleged fraud, &c., without replying to the allegation of absence of value and consideration. On special demurrer, Held good. *Daniells v. Coomb.*

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II. *In Covenant.*

1. In covenant against the surviving executrix of a lessee for a breach of one of the covenants in an indenture of lease, the declaration alleged, that on the death of

the lessee all his estate and interest in the lands came to and vested in the defendant and one *M.*, since deceased, which defendant and *M.* were executrices of the lessee; by reason whereof the defendant and *M.* as executrices became and were possessed, &c.:

Held: a sufficient averment that the term vested in the defendant and *M.* as executrices. *Ackland v. Pring.*

Page 937

2. Held, also: that it was unnecessary to aver that the term had vested in the defendant and *M.* as executrices; as the vesting of a term in the lessee's personal representatives, together with the liability of such personal representatives to be sued upon the covenants of the lessee, is, in effect, a conclusion of law. *Ibid.*

III. *In Debt.*

i. *Plea.*

1. In debt by the drawer and payee of a bill of exchange for 25*l.* 10*s.* 3*d.*, drawn in November "for value received to *Michaelmas* last," the defendant pleaded that before the acceptance he held a messuage, &c., as tenant to the plaintiff, at a certain rent, and that the bill was drawn and accepted in payment by anticipation, amongst other considerations, of 12*l.* 10*s.*, part of the said rent not then due, and that before the drawing and acceptance of the bill the plaintiff assigned the messuage to *J. S.*, of which the defendant had no

notice until after such drawing and acceptance ; that after the bill became due, and before the commencement of the suit, *J. S.* gave notice of the assignment to the defendant, and required and received the 12*l.* 10*s.* rent from him; and that, therefore, the consideration of the acceptance as respected the 12*l.* 10*s.* wholly failed :

Held (after the plaintiff had pleaded over, viz. upon demurrer to the replication), that the plea was bad, on the ground that it answered only *part* of the consideration, though pleaded to the count on the bill generally, and that fraud (which was not alleged) was not necessarily to be inferred from the statement in the plea. *Clark v. Lazarus.* Page 167

2. A plea to a declaration against a gaoler for the escape of *J. S.* a debtor in execution, after stating a return into custody before action brought, alleged that the defendant did thereupon keep and detain, and from thence hitherto hath kept and detained and before and at the commencement of the suit kept and detained, *and still doth keep and detain the said J. S. in his custody, in execution at the suit of the plaintiff.* The latter words are surplusage, and do not render an escape, after the commencement of the suit, and before plea pleaded, admissible in evidence, upon a replication *de injuriâ.* *Davis v. Chapman.*

IV. *In Replevin.*

1. A rent charge is devised to *A.* so long as her conduct and behaviour shall be discreet, and meet with the approbation of *J. S.* The discreteness of the conduct and behaviour of *A.*, and the approbation of *J. S.*, are conditions subsequent, compliance with which need not be averred in a plea alleging the continuance of the rent charge. *Wynne v. Wynne.*

Page 8

2. An avowry for a rent charge devised to *A.* the wife of *B.* may be made by *B.* and *A.*, in the right of *A.* *Ibid.*, and see 19, n.
3. So although the rent charge issue out of a term of years ; *semble.*

Ibid.

4. *Non cepit*, when pleadable.

13, n.

V. *Generally.*i. *Declaration.*

Inconsistent counts. See SHIP.

ii. *Plea.*

See ATTORNEY, II. 1.

BANKING COMPANY, 2, 3, 4.

BILLS AND NOTES, II. 1, 4.

1. Negative pleas need not be averred. 22, n.
2. Verification, where not necessary 642, (a).
3. Prayer of damages, when necessary to entitle party to costs. 642, (b).

iii. *Replication.*

See BILLS AND NOTES, II. 2.

POLICY OF INSURANCE

See INSURANCE.

PORT

See STATUTE, 3.

POSSESSION

See VENDOR AND PURCHASER.

1. Allegation of, with reference to what period, material.

Page 927, (c).

2. Admitted by consent rule, 524, n.

POSTEA

See PRACTICE, II. i.

PRACTICE

See EJECTMENT,
NEW TRIAL,
PARLIAMENT,
PLEADING,
SHERIFF.

I. *Proceedings before trial.*i. *Writ of summons.*

A writ of summons is served on the defendant more than four calendar months after its date, at his request, in order to avoid the expense of a new or an alias writ: Held: good service. *Coates v. Sandy.* 313

ii. *Distringas.*

The affidavits on which an application for a distringas is grounded must state where the house of the defendant, at which the calls are made, is situated. *Halton v. White.* 295

iii. *Notice of declaration.*

A notice of declaration is served, in which, by a mistake in inserting the year, such notice is made to

bear date three months before the issuing of the writ of summons; to which notice is attached a particular of the plaintiff's demand, dated on the same day and month as the notice of declaration, with the proper year: Held: no irregularity. *Coates v. Sandy.* Page 313

iv. *Inspection of document.*

The court refused to set aside an order made by a judge at chambers, requiring the plaintiffs to permit the defendant to inspect and take a copy of the promissory note on which the action was brought, although it appeared that no special ground was shewn for the order at the time that it was made. *Woolmer v. Devereux.* 758

v. *Changing venue.*

In an action against bankers at *Newcastle-upon-Tyne*, a rule to change the venue from *London* to *Cumberland* or *Northumberland* was made absolute,—with certain conditions as to the defraying, by the defendant, of the additional expenses of the plaintiff's witnesses,—on the ground of the great inconvenience which would be occasioned by the defendants' having to carry their banking books and clerks to *London*. *Attwood v. Ridley.* 893

vi. *Judgment as in case of nonsuit.*

1. Where notice of trial had not been given, two clear terms not having elapsed after issue joined, the court held, under misinformation as to the facts, that the defendant was entitled to move for judg-

ment as in case of a nonsuit. *Higgins v. Stanley*. 336. But see p. 956.

2. A creditor proceeding both at law and in equity to enforce his demand, an order is made in the court of equity, on the petition of the defendant, requiring the plaintiff to elect in which court he will proceed. The creditor elects to proceed in equity. The defendant may move for judgment as in case of a nonsuit at the time at which he would have been entitled to move for such rule if no such election had been made. *Johnstone v. Friedman*. Page 432
3. A defendant who has obtained a rule for the costs of the day cannot move for judgment as in case of a nonsuit until after a fresh default. *Ibid*.

II. Proceedings after trial.

i. Amendment of *postea*.

In debt on simple contract for 10*l.*, the defendant pleaded *nunquam indebitatus* as to all but 3*l.* 10*s.*, and to that sum a tender. The plaintiff, by his particulars of demand, claimed 5*l.* 15*s.* The verdict, as returned upon the notes of the under-sheriff, was, "We find for the plaintiff *for the full amount*." The *postea* being indorsed with a verdict for 5*l.* 15*s.* debt, without noticing the issue or the tender, and without deducting the 3*l.* 10*s.* paid into court with the plea, the plaintiffs, who had proceeded to sign judgment and tax costs, with notice of the irregularity, were

allowed to amend the *postea* upon payment of the costs of the writ of error and of the application. *Wallis v. Goddard*. Page 912

ii. Reduction of damages.

On a motion to reduce damages, the court, on the application of the plaintiffs, made it part of the rule that the plaintiffs should be at liberty to sign judgment and issue execution for the whole amount of the damages, but they were not to levy more than the sum to which the objection did not apply, and costs, until the court should order further. *Davy v. Phelps*.

300

iii. Setting aside verdict.

Where the finding on one issue is for the plaintiff, and on the other for the defendant, and cross rules are sought for to set aside the verdict on such findings, each party must move within the first four days of term. *Deacon v. Stodhart*. 317

iv. New trial.

See NEW TRIAL.

1. A party nonsuited for non-production of a document from a public office, is not entitled to a new trial on the ground of surprise when he has served a clerk in the office with a *subpoena duces tecum* to produce the document, but has omitted to apply to the head of the office for permission for its production. *Austin v. Evans*. 430
2. A plaintiff who chooses to be non-suited in order to avoid an impending verdict for the defend-

ant, cannot have a new trial on the ground that there was evidence to go to the jury. *Austin v. Evans.*

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3. The court will grant a rule nisi for a new trial after the four days, where the motion has been delayed through mistake and the case is one of importance, or one by which the title to property would be bound; *Semble. Price v. Duggan.* 641

4. Where a verdict is taken for the plaintiff, subject to a special case, and before the case is settled the defendant becomes bankrupt, the court will not order — that a verdict shall be entered for the defendant unless the plaintiff will proceed with the case; but they will set aside the nominal verdict and direct a new trial, unless both parties consent to a *stet processus*. *Cottam v. Partridge.* 843

v. *Rule to compute.*

It is irregular to move to make a rule absolute to compute pending a summons to shew cause why the judgment should not be set aside. *Trego v. Tatham.* 509

III. Generally.

i. Affidavits.

Where affidavits contained scandalous and impertinent matter as to the way of life of the defendant, a female, the court granted a rule absolute in the first instance for referring them to the master. *Balls v. Smythe.* 350

ii. Stay of proceedings.

1. In an action of debt tried before

the sheriff, where the verdict is for 1s. the court has no power to stay the proceedings on payment of the amount of the verdict, or to direct that judgment shall be entered for the plaintiff without costs. *Batchelor v. Dudley.* Page 333

2. A judge has no authority, without the consent of the plaintiff, to make an order to stay proceedings in an action, upon payment of the debt and costs upon a subsequent day. *Norton v. Fraser.* 916

PRESCRIPTION

1. Meaning of term. 466, (a).
2. Application of term to privileges of House of Commons. *Ibid.*
3. Origin of period of, 467, n.

PRESENTATION

See CHURCH.

PRESUMPTION

Of party continuing to carry on same mystery. 918, (b).

PRINCIPAL AND AGENT

See AGENT.

PRINCIPAL AND SURETY

See SURETY.

PRIVILEGE

I. Of attorney.

Sheriff not bound to notice, 439, (b).

II. Of parliament.

See PARLIAMENT.

1. Statutes of limitation, how affected by, 444, (a).

1004 **PROTEST.**

2. Breach of, formerly, to *summon* peer or member of the House of Commons. Page 446, (c).
3. *Quære*, as to issuing a writ, but not *serving* it. *Ibid.*
4. So, to sue him in ecclesiastical court. 447, (b).
5. As to bringing action. 463, (a).
6. Period of commencement. 453, (b).
7. Discussion as to. 454 (e). 459, (a).
8. Cases to which it does not extend. 461, (a).
9. Reason of rule. 470, (a).

PROCURATION

Proper mode of signing by, 721, (a).

PROFERT

See OYER.

1. Of deeds operating under statute of uses, where necessary. 420, n.
2. How made, where several deeds in same declaration or plea. 659, (a).

PROMISE

See AGREEMENT, I.
ASSUMPSIT,
COVENANT.

PROMISSORY NOTE

See BILLS AND NOTES.
WITNESS.

PROPERTY

See VENDOR AND PURCHASER.

PROPRIETOR

See COMPANY.

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See ARBITRAMENT, 16.

RELEASE.

PROVISO

See CONDITION.

PUBLIC OFFICER

See BANKING COMPANY, 1, 3, 4
PRACTICE.

RAILWAY

See COMPANY,
STATUTE, 2, 3.

READERSHIP

See CHURCH.

**REASONABLE
GROUND OF BELIEF**

Page 475, n.

REASONABLENESS OF TIME
399, (b).

RECORD

Matter of, *See* PAIS.

RECTOR

See CHURCH.
TITHES.

REDUCTION OF DAMAGES

See PRACTICE, II. ii.

REFERENCE

See ARBITRAMENT, 1.

REGULÆ GENERALES

See RULES OF COURT.

RELEASE

See BILLS AND NOTES, II. 1.
Recital of possession of bargainee in,
689, (d).

REMAINDER

See DEVISE.

RENT

Pleadable as a specialty debt, though demise by parol. Page 432, (a).

RENT-CHARGE

See COVENANT,
PLEADING,

Right to enter and hold lands charged till satisfaction of arrears. 9, n.

REPAIRS

See INSURANCE,
LANDLORD AND TENANT,
STATUTE, 4.

REPLEVIN

See PLEADING.

REPLICATION

See PLEADING, I.

REPORT, SPECIAL

See ARBITRAMENT, 19.

RETURN

See SHERIFF.

REVOCATION

See ARBITRAMENT, 3.

RIENS EN SES MAINS

When to be pleaded. 413, n.

RULE TO COMPUTE

See PRACTICE.

RULES OF COURT

1. *H. 14 J. 1. r. 2. s. 4. Bail. 315, (a).*

2. 1654. Appearance. Page 315, (a).

3. *H. 14 G. 3. Affidavit of acknowledgment in common recoveries* 424.

4. *M. 36 G. 3. Arguments on last day of term.* 365

5. *H. 2 W. 4. c. 1. s. 65. Motions during four first days of term.* 325, n.

6. *H. 4 Vic. 1841. Appearance to declaration in ejectment.* 239

RUSSIA

See ACKNOWLEDGMENT.

SALE

See CONTRACT,
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SATISFACTION

See ARBITRAMENT, 20.

SCIRE FACIAS

See BANKING COMPANY, 1, 3.

SEAL

See ASSIGNMENT, 4.

SEARCH

See FALSE IMPRISONMENT.

SECRETARY

See EVIDENCE.

SEISIN

See LIVERY.

Allegation as to time of, at what period material. 927, (c).

SERVANT

See MASTER AND SERVANT.

SERVICE

See BOND,

1. Of writ of summons. See PRACTICE, I.
2. Of notice of declaration. See PRACTICE, I.
3. Of declaration. See EJECTMENT.

SET-OFF.

See ARBITRAMENT, 18.

What, the subject of set-off.

1. Where a person is employed to do certain work for a certain sum, and part of the work is afterwards done by the employer, the amount of the latter work is matter, not of set-off, but of deduction. *Turner v. Diaper.* Page 241
2. Where, therefore, in debt for work and labour, the defendant pleaded, never indebted except as to 37*l.* 6*s.* 8*d.*; payment of 36*l.* 3*s.* before action, and payment of 1*l.* 3*s.* 8*d.* into court, and the plaintiff joined issue on the first and second pleas, and took the 1*l.* 3*s.* 8*d.* out of court, and at the trial the defendant proved an agreement to do the work for 40*l.*, and that he had paid 36*l.* 3*s.* on account, independently of the 1*l.* 3*s.* 8*d.* paid into court, and to cover the balance, 2*l.* 13*s.* 4*d.*, he proved that he had employed workmen to finish the work, and had paid them the last-mentioned sum; — it was held, that the evidence was admissible under the plea of never

indebted, and that the 2*l.* 13*s.* 4*d.* could not be pleaded as a set-off.

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SEVERAL PLEAS

See PLEADING.

SHARE

See COMPANY.

SHAREHOLDER

See COMPANY.

SHERIFF

See NEW TRIAL.

1. Not bound to notice privilege of attorney. 439, (b).
2. Consequence of his arresting a peer. *Ibid.*
3. Trial before. See PRACTICE,
4. Where the execution of a *fi. fa.* is entrusted to a special bailiff appointed by the judgment creditor, who seizes goods which, upon a claim being made by a third party, he afterwards relinquishes; the proper course for the judgment creditor to take, if he wishes to issue a *ca. sa.* (without pledging himself to shew the validity of the claim made) is, to request the sheriff to return the *fi. fa.*, such request to be accompanied by a statement of the object for which such a return is required, and by an offer to indemnify. *Harding v. Holden.* 914
5. The judgment creditor having, however, ruled the sheriff to return the writ without any such statement or offer, the sheriff obtained a rule nisi to set aside the

rule to return the writ. The court discharged the rule obtained by the sheriff, on the terms of the payment of the sheriff's costs, and of giving an undertaking to bring no action against him. *Harding v. Holden.* Page 914

SHIP

Liability of owner.

1. Where, in a memorandum of charter, it is agreed that the ship shall proceed to *Quebec*, and there load from the factors of the freighter a full cargo, *not exceeding what the ship can reasonably stow*, the words in italics are merely a qualification upon the ship-owner's engagement to carry a full cargo, and not a substantive engagement on his part to stow the cargo in a reasonable manner. *Gould v. Oliver* 208

2. Upon an issue whether a cargo (loaded on deck) is improperly loaded, *A.*, a witness called on the part of the plaintiff, to prove that the practice of stowing part of the cargo upon deck is dangerous, states, in answer to a question put to him on cross-examination, that it is usual for ships in the particular trade to carry deck-cargoes. *A.* may be asked, upon re-examination, whether it is not usual for the ship-owner to pay for deck-cargo washed, or thrown, overboard. *Ibid.*

3. Upon an issue whether a deck-cargo was loaded at the request and by the order and direction of the freighter, proof that the su-

perintendent of the freighter's warehouse, who delivered out the goods for shipping, was aware of and approved of the stowage of the cargo, does not support the affirmative of the issue. Page 208

4. A direction to a jury that *prima facie* the deck was not the proper place for stowing any part of the cargo, and that if it increased the danger of the ship, or of that part of the cargo, it is an improper stowage, was held to be correct, though it appeared that it had been usual to load deck-cargoes in the particular trade, but it also appeared to be usual for the ship-owner to bear the loss of deck-cargo washed, or thrown, overboard. *Ibid.*

5. By a memorandum of charter it is agreed:—that a vessel shall proceed to *Trieste*, and there load a full cargo, and being so loaded shall proceed to a port in the United Kingdom, and deliver the same, upon payment of freight at a certain rate; that forty running days shall be allowed the merchants (if not sooner dispatched) for loading at *Trieste*, and for unloading at the port of discharge; and twelve days on demurrage, at 6*l.* per day; *the vessel to sail from England on or before the 4th of February next*—and that the vessel shall be addressed to the charterer's agents at the port of loading and discharge: Held, that the sailing on or before the 4th of *February* was a condition precedent. *Glaholm v. Hays.* 257

SIGNATURE*See* ARBITRAMENT, 7, 8.**SLANDER****I. Variance.**

1. In an action of slander, the words laid in the declaration were "S. has got himself into trouble; he is out on bail for 100*l.*, and he is to be tried at the *Old Bailey*, for buying cocks which have been stolen from P. and Co. by their apprentice, who sold them to W., who sold them to S." The words proved were, "S. has got himself into trouble; he is out on bail for 100*l.*, and *I have heard* he is to be tried, &c.:"

Held: a variance; but one which might be cured by an amendment at nisi prius, under the 3 & 4 W. 4. c. 42. s. 23., or by a special indorsement on the nisi prius record, under s. 24. *Smith v. Knowelden.* Page 561

SPECIAL BAILIFF*See* SHERIFF, 4.**SPECIAL CASE***See* PRACTICE, II.**SPECIAL INDORSEMENT***See* SLANDER.**SPECIAL REPORT***See* ARBITRAMENT, 19.**SPECIALTY DEBT***See* RENT.**STATUTE.****STAMP***See* COMPANY.**I. On Agreements.***See* AGREEMENT, III.

1. Upon bought and sold notes.

Page 522, (a).

II. On Bills and Notes.*See* BILLS AND NOTES.**III. On Deeds.**

2. Effect of deed properly stamped, referring to unannexed schedule. 522, (a).

3. On assignment of parish apprentice. 666, (a).

4. An assignment of an indenture of apprenticeship, on which only a 1*l.* stamp was affixed, was held to be receivable in evidence, though the indenture of assignment contained covenants for supplying the apprentice with food, &c. and even for extending the period of the apprenticeship. *Morris v. Cor.* 659

STATUTE.**I. Public.**

See ACTON BURNELL,
CAPIAS AD RESPONDENDUM,
CHURCH,
FRAUDS, STATUTE OF,
LIMITATIONS,
MARLBIDGE,
MERTON,
QUIA EMPTORES,
USES,
WILL,

And see TABLE OF STATUTES
CITED.

II. Private.**i. Construction of.**

1. Where the language of an act of parliament obtained by a company for imposing a rate or toll upon

the public is ambiguous, or will admit of different meanings, that construction is to be adopted which is most favourable to the public. *Barret v. The Stockton and Darlington Railway Company.*

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2. Where, therefore, an act of parliament contained a clause authorising a railway company to demand a rate not exceeding 4*d.* per mile upon all coals carried along the railway, and a subsequent clause, directing that for all coals shipped for exportation, a rate not exceeding ½*d.* per ton per mile should be charged; it was held, that the second clause was to be read, as an exception engrafted upon the first; and also that coals shipped for *London* were coals shipped for the purpose of exportation. 134

3. Where an act of parliament directed that a railway company should take a lower rate of tonnage upon goods conveyed by the railway and shipped in the port of *A.*; goods shipped at a place within the legal port of *A.*, but at some distance from the town of *A.*, were (under the circumstances) held to be entitled to the benefit of the reduction, though the act had previously spoken of "the port and town of *A.*" *Ibid.*

4. An incorporated company is authorised by act of parliament to make a navigable canal, the construction of which will interfere with an antient drain. By one section of the statute the company is

required to make a drain on each side of the canal and parallel therewith, in lieu of part of the antient drain which will be destroyed. By another section the company is required to make such arches, tunnels, culverts, *drains* or other passages, over, under, by the side of or into the canal, and the trenches, streams and water-courses communicating therewith, and the towing-paths on the sides thereof, of such depth, breadth, and dimensions as shall be sufficient to convey the water clear from the lands adjoining or lying near the canal, without obstructing or impounding the same; and to support, maintain, cleanse, and keep in repair all such arches, tunnels, culverts, *drains* and other passages:

Held, that the drains made in pursuance of the former section, in lieu of the antient drain, are to be cleansed by the company, as well as those made in pursuance of the latter section; and that a summary remedy given by the latter section, in case of non-repair by the company, is applicable to a default in cleansing the drains made in lieu of the antient drain. *Priestley v. Foulds.* Page 751

STAY OF PROCEEDINGS

See ASSUMPSIT, 4.

PRACTICE, III.

STOWAGE

See SHIP, 1, 2, 3, 4.

SUBMISSION

See ARBITRAMENT, 2, 3.

SUPERSEDEAS

Writ of, Page 473, (c).

SUBPOENA DUCES TECUM

See PRACTICE, II.

SURGEON

See CONDITION, 6.

SURETY

1. Debt, against a surety upon a bond conditioned for the due payment by *M.* of all sums in which *M.* should from time to time become indebted to the plaintiffs, for goods supplied to him by them in the course of their business. The plaintiffs having drawn a bill upon *M.* for coals supplied to him, discounted the bill, which was dishonoured. *M.* went to the plaintiffs, and telling them that he wanted 80*l.* to enable him to take up the bill, asked them to *lend* him that sum. The plaintiffs thereupon gave him a cheque for 80*l.*, with which, and his own money, he took up the bill: Held: that this was, in substance, not a loan by the plaintiffs to the defendant of the 80*l.*, but an advance by them for the specific purpose of taking up the bill, which, as between the plaintiffs and *M.*, remained unpaid to that extent; and that consequently, as the plaintiffs might have recovered the 80*l.* from *M.* as for goods sold, the defend-

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ant was liable to pay that sum.
Davey v. Phelps. Page 300

SURETY OF THE PEACE

See PEACE.

SURPLUS

See BOND.

SURPLUSAGE

See PLEADING.

SURPRISE

See PRACTICE.

TAILOR

See GOODS SOLD.

TAX

See COVENANT.

TAXATION OF COSTS

See ARBITRAMENT, 5.
ATTORNEY, II. 3.
COSTS.

TENDER

See PRACTICE.

TERM, LAST DAY OF,

See RULES OF COURT.

TERM OF YEARS

See ASSIGNMENT, 3.
PLEADING.

TIME

See CONTRACT,
PLEADING,

Reasonableness of, 399, (b).

TITHES

1. Common law right of rector to

TRUST.

- parochial tithes, a right arising within legal memory. Page 466, n.
2. Whether indebitatus assumpsit will lie for, 249, n.

TOLL

- See STATUTE, 1,
Whether indebitatus assumpsit will lie for, 249, (c).

TONNAGE

See STATUTE, 3.

TRADE

- Agreement in restraint of,
See PLEADING.

TRANSFER

See COMPANY.

TRAVERSE

See INDUCEMENT,
PLEADING.

TRESPASS

See CAPIAS AD RESPONDENDUM.

TRIAL

- Before sheriff,
See PRACTICE, III.

TROVER

1. In trover for an unstamped guarantee mutilated by the defendant, the plaintiff is entitled to such damages as he might have recovered in an action on the guarantee, if stamped and un mutilated. *M'Leod v. M'Ghie.* 326

TRUST

- See DEVISE.
1. Disclaimer of trust estate. 679, n.
-

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UNDERTAKING

See AGENT, II. 3.

USAGE

See SHIP, 2. 4.

USE

- At common law, might be disclaimed by parol. Page 691, (c).
Secus since the 27 H. 8. c. 10. (Statute of Uses). 691, (c).

USE AND OCCUPATION

- A party who had agreed to rent a house sent in a woman to clean the house, and workmen to paper one of the rooms: Held to be sufficient evidence of occupation to go to the jury, in an action for use and occupation. *Smith v. Twoart.* 841

USES, STATUTE OF

See PROPERT,
USE.

VALUE

See INSURANCE.

VARIANCE

See BANKING COMPANY, 1.
GUARANTEE,
SLANDER.

VENDOR AND PURCHASER

See GOODS SOLD,
WARRANTY.

1. The plaintiffs bought wheat of the defendants under the following contract: — "Sold the 25th of October 1836, to Messrs. J. W.

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and son, the plaintiffs, about 300 quarters of wheat, as per sample, at 51s. per quarter on board. Payment, by bankers' draft on *London*, at two months' date, to be remitted on receipt of invoice and bill of lading." On the 27th of *October* the wheat was put on board a general ship, under a bill of lading, by which it was made deliverable "to order or assigns, he or they paying freight, &c." The defendants caused an insurance to be effected on the wheat by their agents, which insurance was forwarded to the plaintiffs, in pursuance of an arrangement with the plaintiffs, whereby they were to charge them the premium, in addition to the cost price of the wheat. The defendants sent the plaintiffs the bill of lading indorsed generally, and an invoice, stating the wheat to be shipped by order, and *for the account and risk of the plaintiffs*. Upon the 'receipt of the invoice and bill of lading, the plaintiffs, instead of a bankers' draft on *London*, transmitted to the defendants their own acceptance for the invoice price of the wheat, and the cost of the insurance, which the defendants immediately returned, informing the plaintiffs by letter that such acceptance was contrary to agreement, and that they had arranged otherwise for the disposal of the cargo, which they obtained back from the captain of the vessel and resold:

VENUE (CHANGING).

Held, that although the *property* in the wheat passed to the vendees under the contract, the right to the *possession* was not to vest until they remitted to the vendors a bankers' draft on *London* in payment, and that the vendees having failed to comply with that condition, the vendors were justified in preventing the delivery of the wheat. *Wilmshurst v. Bowker*. Page 792

2. A coat ordered of one *A.*, a tailor, by *B.* was cut out, tacked together, and tried on in *A.*'s lifetime, but was finished and delivered after his death, by his administratrix. The jury were told by the under-sheriff that the coat, if it was so nearly finished in *A.*'s lifetime as to require very little to be done to it afterwards, was sold and delivered by *A.*:

Held a misdirection; and it was said the price of the coat might be recovered under a count for goods sold and delivered by the plaintiff as administratrix. *Werner v. Humphreys*. 853

VENIRE DE NOVO

See WRIT OF INQUIRY.

1. Distinction between *venire de novo* and new trial. 238, n.

VENIRE FACIAS

See WRIT OF INQUIRY.

VENUE (CHANGING)

See PRACTICE.

WARRANT OF ATTORNEY.

VERDICT

1. Contingent, cannot be given except subject to question of law. Page 328, (a).
2. Mode of obtaining the benefit of a contingent verdict. *Ibid.*
3. Defects aided by, 333, (b).
4. Setting aside, 317

VERIFICATION

See **BANKING COMPANY**, 3.

- When necessary. 779, (a).
When not. 816, (a).

VICAR

See **CHURCH**.

VINDICATION OF PROPERTY SOLD

- In the civil law. 657, (b).
See also *Errata et Addenda* to 657.

WAIVER

See **ARBITRAMENT**, 11.

WARRANT OF ATTORNEY

See **BOND**,
INSOLVENT.

I. *Validity of.*

1. Under the 3 G. 4. c. 39. s. 1, 2. a warrant of attorney is not valid as against the assignees of a bankrupt, unless it be filed, or judgment be signed upon it, within twenty-one days after its date. *Everett v. Wells.* 269
2. So, although the petitioning

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creditor's debt was not contracted until after the expiration of the twenty-one days. Page 269

WARRANTY

And see **VINDICATION**.

1. *A.*, a wine merchant, orders a crane rope of *B.*, a dealer in, and who represents himself as a manufacturer of, ropes. *B.*'s foreman thereupon ascertains the nature and dimensions of the rope required, and being told that it is wanted to raise pipes of wine from the cellar, says that a rope must be made on purpose. *B.* does not make the rope himself, but sends the order to his manufacturer, who employs a third party to make the rope :

Held,—in an action on the case by *A.* against *B.*, to recover damages resulting from the insufficiency of the rope,—that *B.*, as between him and *A.*, is to be considered as the manufacturer of the rope ; and that an implied warranty arises out of the contract, that the rope is a fit and proper one for the purpose for which it was ordered. *Brown v. Edgington.* 279

2. *Semble*, that, to raise an implied warranty, it is not necessary that the vendor should also be, or should represent himself as, the manufacturer, where he is told of the purpose for which the goods are required, and the purchaser does not select them himself, but relies on the skill and judgment of the vendor. *Ibid.*

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WIFE

See HUSBAND AND WIFE.

WILL

See DEVISE.

WITHDRAWING RECORD

See COSTS.

WITNESS

See BILLS AND NOTES, I. 3.
COSTS.

1. Admissibility of drawer of accommodation-bill. *Flight v. Hammond.* Page 383, n.
2. In an action by the payee against one of the makers of a joint and several promissory note, another of the makers, since the 3 & 4 W. 4. c. 42. s. 26., is a competent witness for the defendant to support a plea of payment. *Russell v. Blake.* 374

WORK AND LABOUR

See HUSBAND AND WIFE,
SET-OFF.

Effect of act of employer in preventing workman from completing work. Page 243, n.

WRIT OF ERROR

See ERROR.

WRIT OF INQUIRY

Appears to be now issuable where *venire facias de novo* formerly necessary. 410, n.

WRIT OF SUMMONS

See PRACTICE.

WRITTEN INSTRUMENT

Effect of setting out, *in hæc verba.* 251, n.

END OF THE SECOND VOLUME.

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